IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 74

SOUTHERN RAILWAY COMPANY, *Appellant*

v.

STATE OF NORTH CAROLINA; DUKE UNIVERSITY; THE DURHAM CHAMBER OF COMMERCE, INC.; RESEARCH TRIANGLE INSTITUTE; ERWIN MILLS, INC.; and MARY TRENT SEMANS, *Appellees*

On Appeal from the United States District Court for the Middle District of North Carolina—Durham Division

JURISDICTIONAL STATEMENT

WILLIAM T. JOYNER
P. O. Box 109
Raleigh, N. C.

EARL E. EISENHART, JR.
Southern Railway Company
P. O. Box 1808
Washington 13, D. C.

Counsel for Appellant

February 12, 1963.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SUBJECT INDEX

CITATIONS

CASES:

STATUTES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

SOUTHERN RAILWAY COMPANY, *Appellant*

v.

STATE OF NORTH CAROLINA; DUKE UNIVERSITY; THE DURHAM CHAMBER OF COMMERCE, INC.; RESEARCH TRIANGLE INSTITUTE; ERWIN MILLS, INC.; and MARY TRENT SEMANS, *Appellees*

On Appeal from the United States District Court for the Middle District of North Carolina—Durham Division

---

JURISDICTIONAL STATEMENT

Southern Railway Company (defendant below) appeals from the judgment of the United States District Court for the Middle District of North Carolina, entered on October 19, 1962, setting aside an order of the Interstate Commerce Commission, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the District Court for the Middle District of North Carolina, Durham Division, is reported in 210 F. Supp. 675, and is attached hereto as Appendix A. The report and order of the Interstate Commerce Commission in Finance Docket 21563, dated June 27, 1962, authorizing the Southern Railway to discontinue the operation of two intrastate passenger trains is not yet reported and is attached hereto as Appendix B. The recommended report and order of the hearing examiner of the Interstate Commerce Commission, with certain exhibits attached thereto, which was referred to and adopted by the Interstate Commerce Commission as a part of its report is attached hereto as Appendix C.

JURISDICTION

This suit was brought by appellees under 28 U.S.C. §§ 1336, 1398 and 2321-2325 to set aside an order of the Interstate Commerce Commission. Trial was held before a three-judge court convened under 28 U.S.C. § 2284. The judgment of the District Court setting aside the Commission's order and permanently enjoining appellant from acting thereunder was entered on October 19, 1962, and notice of appeal was filed in that court on December 14, 1962.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *Capital Transit Company*, 325 U.S. 357 (1945); *Chicago, M., St. P. & P. R. Co.* v. *Illinois*, 355 U.S. 300 (1958); *New York, Susquehanna & Western R.R. Co.*

v. *United States*, 200 F. Supp. 860 (D. N.J., 1961), probable jurisdiction noted *New Jersey* v. *New York, Susquehanna & Western R.R. Co.*, 370 U.S. 933 (1962).

THE STATUTE INVOLVED

Section 13a(2) of the Interstate Commerce Act, as amended, 72 Statutes at Large 568, 572 (49 U.S.C. § 13a(2)) empowering the Interstate Commerce Commission to authorize the discontinuance of intrastate passenger trains is set forth in Appendix D hereto.

QUESTIONS PRESENTED

The following questions are presented in the appeal:

(1) Where the District Court accepted, as valid and as properly supported, the Interstate Commerce Commission's findings of fact as to the economic burden of two intrastate passenger train operations sought to be discontinued, was it error for the District Court to reverse the ultimate conclusion of the Commission that the continued operation of the trains will constitute an unjust and undue burden upon interstate commerce on the ground that such ultimate conclusion of fact was arbitrary, capricious and not supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"?

(2) Where the District Court stated that it had accepted, as valid and as properly supported, all of the subsidiary findings of fact of the Commission, was it error for the District Court to reverse the ultimate conclusion of the Commission that the present and future public convenience and necessity permit the discontinuance of the passenger trains on the ground that such ultimate conclusion of fact by the Commission

was arbitrary, capricious and not supported by evidence?

(3) In arriving at its conclusion that the evidence was insufficient to justify the Commission's finding that public convenience and necessity does not require continuance of the service, did the District Court err in weighing the evidence, in substituting its judgment for that of the Commission as to the weight and significance to be given the evidentiary facts and in making its own findings as to the need for the service?

(4) Did the District Court err in substituting its opinion for that of the Commission as to the result of the weighing of the economic waste and the consequent damage to the railroad and to the national transportation system from the enforced continuance of operations against the disappearing use of the passenger service in question?

(5) Did the District Court err in construing Section 13a (2), Title 49 U.S.C., to require that the Interstate Commerce Commission must, as a matter of law, determine and consider the profit, if any, made by the railroad from overall operations on the segment of line between Greensboro and Goldsboro, North Carolina, from which the deficit passenger trains 13 and 16 were to be discontinued, and err in holding that the Commission had not given adequate consideration to the question of such profit?

(6) Was it error for the District Court to attempt to consider or to reach any conclusion of its own as to the possible profits earned from the railroad's total operations over the 129 mile line in question by looking at figures as to the average per mile earnings over the

railroad's 6,000 mile interstate system, and in the absence of any competent evidence of the overall earnings on the segment in question?

(7) If the District Court did not err in its conclusion that Section 13a (2), Title 49 U.S.C., requires in this case consideration of the freight profit from the operation of the segment over which the passenger trains in question operate, did the District Court err in finding that the record is "complete bearing upon all aspects of the controversy", and did the District Court err in reversing the order of the Commission instead of remanding the matter for the purpose of taking additional evidence, if necessary, and of considering operating profits and making agency findings thereon?

(8) Did the District Court err in permanently and perpetually enjoining and restraining the Southern Railway, its officers, agents and employees from discontinuing the passenger trains in question?

STATEMENT OF THE CASE

Appellant Southern Railway Company, having been denied permission by the State authorities to discontinue a pair of intrastate passenger trains operating between Greensboro and Goldsboro, N. C., petitioned the Interstate Commerce Commission for such authority pursuant to Section 13a(2) of the Interstate Commerce Act. Following submission by the carrier of certain evidence required by the Commission's rules and a public hearing lasting several days, the Commission's hearing examiner filed a recommended report and order in which he concluded, upon the evidence analyzed in his report and applied to the Commission's previous interpretations of Section 13a(2), that the

railroad's petition should be granted. His report was adopted by the Commission through its Division 3 which found that "the present and future public convenience and necessity permit the discontinuance of service by the Southern Railway Company of its passenger trains Nos. 13 and 16 between Greensboro and Goldsboro, N. C., and that the continued operation thereof would constitute an unjust and undue burden upon the interstate operations of that carrier and upon interstate commerce."

Reconsideration by the Commission having been denied, certain of the protestants initiated this suit in the United States District Court for the Middle District of North Carolina which held unlawful and set aside the order of the Commission and permanently and perpetually enjoined appellant from discontinuing the trains. The court's decision was based on two grounds:

1—That the Commission's order is unwarranted in law in that Section 13a(2) does not authorize the Commission to find that the continued operation of the trains will constitute an unjust and undue burden upon interstate operation of the petitioning carrier or upon interstate commerce unless there is evidence of the financial results of over-all operations on the segment of line from which the passenger trains are to be discontinued, and

2—That the Commission's holdings were not supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" that the service in question constitutes an undue burden on the interstate aspects of the carrier's operations, or that the present or

future public convenience and necessity permit such discontinuance.

In its first ground for decision the District Court has in effect amended Section 13a(2) to provide a rule for the determination of "unjust and undue burden" in train discontinuance cases which has no foundation in the language of the statute nor in its purpose.

The legislative history of Section 13a makes it clear that Congress recognized that railroad passenger trains no longer are used or needed to the same degree as formerly and that their continued operation, where they have been largely abandoned by the public, is an economic waste which should be eliminated in the interest of greater carrier efficiency and ability to meet competition in those aspects of service where railroads are needed.

Pertinent excerpts from the legislative history are set forth in Appendix E attached hereto, and we have further elaborated upon this point in the following part of this statement where we show this Court that the lower court's interpretation of Section 13a(2) raises a substantial question.

In connection with the second of those two grounds, it is important to note some of the facts.

The District Court did not challenge any finding of fact as to operations, patronage, money losses, manpower waste, other available means of transportation, lack of need for the trains, or demonstrated absence of desire by the public to use the trains.

The District Court differed only with the ultimate conclusions of the Commission, holding them capricious, unreasonable and unsupported.

Moreover, the District Court, in reaching its conclusion to enjoin permanently the discontinuance of the trains, must have reached an ultimate conclusion of its own that on the facts in the record, and as found by the Commission, and as accepted by the District Court, no reasonable commission or court could now, or ever in the future, reach a conclusion that the public convenience and necessity could permit the discontinuance of the trains. The District Court not only set aside the ultimate conclusion of the Commission but it also substituted a definite ultimate conclusion of its own as a basis for its permanent injunction.

In view of all of such acts by the District Court, it is proper and necessary to set forth some of the important facts. They will throw light on our later discussion of the substantial nature of the questions.

These are some important accepted facts about the operating burden of the trains—the burden on money and the burden on manpower:

1. The net savings to be realized by the discontinuance of the trains would be not less than $90,000.00 a year.

2. For the most recent calendar year of operations covered by the record, the direct expenses of operating the trains were eight times the passenger revenues derived from such operations and were more than three times all revenues from operations.

3. For that year, the wages of the train and engine crews alone were more than four times the passenger revenues.

4. For that year, the average number of passengers per train mile was approximately seven, and the aver-

age number of trained and skilled men working on the trains per train mile was approximately seven.

These are some important accepted facts about the complete lack of need for the service and the almost complete lack of desire by the public to use the service:

1. The 129-mile branch line runs through a heavily populated section in the middle of the State of North Carolina. Excellent hard surface roads parallel its entire length.

2. No protest was made by persons living along or desiring to use the service on the eastern 74 miles of the 129 mile line, that is, east of Durham.

3. Virtually all of the complaints came from the city of Durham, or its immediate vicinity, 55 miles east of Greensboro, with a few from Burlington, 21 miles east of Greensboro.

4. All passenger complaints related to interstate trips extending beyond the line in question and were made by persons who in various degrees of frequency desired the personal convenience of a through car handled on the trains in question in connection with other trains of appellant at Greensboro, N. C., and trains of another railroad at Washington, D. C., to and from eastern cities, principally New York.

5. Adequate public service transportation is available by bus. The paralleling bus service consists of fifteen buses each way each day over the western 81 mile portion of the line, that is, between Greensboro and Raleigh, and eight buses each way each day over the eastern 48 mile portion of the line, that is, between Raleigh and Goldsboro. So, there was an average of 12½ bus trips over every mile for every train trip.

6. The same desired connection with Southern at Greensboro and numerous additional train connections there can be made by 55 miles of travel over paved roads by private automobile or by any one of the fifteen daily buses running each way. Any one of the three train connections north or south could be made with Seaboard Railway at Raleigh by 26 miles of travel over paved roads by private automobile or by using one of the fifteen daily buses each way.

7. Here the fact is again important that each train carried for the last full year of statistics, an average of seven passengers per mile.

8. Adequate public carrier transportation service is available by air, to and from the Raleigh-Durham Airport, approximately 14 miles from Raleigh and 13 miles from Durham, where there are numerous flights daily in all directions, the greater number being to eastern cities, eight to New York and nine to Washington.

Construing the statement of action made by the District Court in the light of prior portions of its opinion, it appears that the court did two things:

1. It held that the Commission erred in failing to require evidence of and in failing to give consideration to the question of profits on the 129-mile branch line over which the two trains were operated. This failure the court seemed to hold prevented the proper balancing of burden against need.

2. It held that the Commission was arbitrary and capricious in its conclusion that the public need was negligible and the public convenience inconsequential. In fact it appears that the District Court

held that the only conclusion that the Commission could reach on the record was that the public need was so great that it would outweigh the money losses and man-power waste, irrespective of the existence or the size of profits on the 129-mile line or profits on the complete intrastate operations.

We submit that the District Court erred in both matters; that the court invaded improperly the province of the Interstate Commerce Commission set apart by Congress; and that it substituted its judgment for that of the Commission in both matters.

THE QUESTIONS ARE SUBSTANTIAL

Substantial questions of general importance are raised by the District Court's holdings,

1—interpreting Section 13a(2) to require that the Commission give effect to overall revenues derived from a segment of line before it can find that a deficit passenger train constitutes an undue burden permitting its discontinuance, and

2—finding that in the absence of evidence as to profits, if any, from such segment there is not sufficient evidence to support the Commission's ultimate conclusion that public convenience and necessity permits the discontinuance and that the continued operations thereof would be an unjust and undue burden upon the interstate operations of the carrier or upon interstate commerce.

The questions involve the construction and application of a new and a very important statute enacted August 12, 1958, as a part of the Transportation Act of

1958. The part of the statute here involved, 49 U.S.C. § 13a(2), commits to the Interstate Commerce Commission an entirely new field of authority and action, the discontinuance of unprofitable and uneconomic intrastate passenger trains.

Congress was dealing not with a new but with a rapidly worsening situation—the threat posed to the national transportation system because of the competitive and economic burdens on the railroads.

The Reports of the Senate and House Committees, which considered the legislation, show that Section 13a(2) was striking at economic waste, that the Congressional purpose was to permit discontinuance of the operation of services that "no longer pay their way and for which there is no longer any public need to justify the heavy financial losses involved." (S. Report No. 1647, 85th Congress, 2nd Session, 1958, pp. 21-22). It was thus the announced intent of Congress that where the loss from the train operation was substantial and the need was not substantial, the services should be discontinued, irrespective of profits on the line in question, intrastate profits in the State, or elsewhere.

There are at least three places where the Committees speak of discontinuance of unprofitable and unnecessary services without any reference to or suggestion of compensating profits anywhere.

In the same statute which contains Section 13a(2), Congress made provision for a loan guarantee fund to be made available out of public funds to approved railoads in an amount not to exceed five hundred million dollars for rail transportation relief (72 Statutes at Large 568, 569, 49 U.S.C. §§ 1231-1240). The Congress which was preparing to provide one half billion dollars

was also providing for the elimination of waste in rail services not needed, interstate or intrastate.

The interpretation of the Interstate Commerce Commission as the agency charged with the administration of the Act is of some significance in the ascertainment of the legislative intent. See *New York, New Haven & H. R. Co.* v. *Interstate Commerce Commission*, 200 U.S. 361, 402 (1906); *Boston & Maine R. R. Co.* v. *Hooker*, 233 U.S. 97, 118 (1914).

In *Southern Pacific Co. Partial Discontinuance*, 312 I.C.C. 631, 633 (1961) the Commission said:

> "The burden [upon the carrier's interstate operations or upon interstate commerce, as expressed in Section 13a(2)] . . . is to be measured by the injurious effect that the continued operation of the train proposed for discontinuance would have upon interstate commerce. As is indicated by its legislative history, the purpose of section 13a(2) is to permit the discontinuance of the operation of services that 'no longer pay their way and for which there is no longer sufficient public need to justify the heavy financial losses involved.' (S. Rep. 1647, 85th Cong.) Nowhere in section 13a(2) or elsewhere in the law is there any requirement that the prosperity of the intrastate operations of the carrier as a whole, or any particular segment thereof, must be given effect in determining whether the operation of an individual intrastate train imposes an unjust and undue burden on interstate commerce. To hold otherwise would be contrary to the apparent intent of the Congress."

The Commission has constantly rejected contentions that an undue burden on interstate commerce from operation of a service can exist only where over-all operations are unprofitable or where petitioner is not

receiving a fair return over-all. *Great Northern Ry. Co.—Discontinuance of Service,* 307 I.C.C. 59, 69 (1959), a Section 13a(1) interstate train case; *New York Central R. Co. Abandonment,* 254 I.C.C. 745, 761 (1944), a Section 1(18) abandonment case.

In the instant case, where the facts accepted by the District Court showed that the loss of money from the operation of the trains was substantial, and the wasted manpower glaring, and where, as found by the Commission, the need was hardly perceptible, there was no necessity for the Interstate Commerce Commission to give effect to the amount of profit from the line or from intrastate business. The Commission satisfied its statutory requirement by finding that the operation of the trains amounted to an unjustified economic waste, considering losses from the operation weighed against the public need.

Section 13a(2) has not been construed by the Supreme Court of the United States. Whether that subsection, directed at intrastate train discontinuances, or subsection (1) of Section 13a, dealing with interstate trains, applied to a certain factual situation was argued before the Court this term in *New Jersey* v. *New York, Susquehanna & Western R.R. Co.,* No. 104, but as yet no decision has been announced.

There have been several cases in which orders of the Commission granting relief under Section 13a(2) have been before various district courts, in each of which the Commission's order has been sustained:

City of Philadelphia v. *United States,* 197 F. Supp. 832 (E.D. Pa., 1961);

State of Montana v. *United States,* 202 F. Supp. 660 (D. Mont., 1962);

People of the State of California v. *United States*, 207 F. Supp. 635 (N.D. Calif., 1962).

In the last case where questions very similar to those in the instant case were raised, the three judge court, in a *per curiam* decision, upheld the Commission's order authorizing the discontinuance of an intrastate train. The court said in final part: "The compass of our review is narrow. If the Commission's order is justified and supported by the Findings contained in the Commission's report, the Commission's order must stand. We so conclude.

We find this cause to be without merit.

It is dismissed."

One of the questions disposed of by the court's order was that of overall profits which the Commission had decided as follows:

> "In reaching our conclusions herein, we have given full consideration to protestants' contention that petitioner's system operations as a whole must be unprofitable, or that it is failing to receive a fair return on a system-wide basis considering both freight and passenger traffic before it can be found that an undue burden on interstate commerce exists. We reject such contention . . . [citing precedents]." *Southern Pacific Company Partial Discontinuance of Passenger Trains Between Los Angeles and Sacramento etc.*, Finance Docket No. 20503 decided July 21, 1960, mimeographed sheet 34, (not printed in full in I.C.C. reports)

It is important to the railroad industry and the public that the Supreme Court construe and resolve differences in interpretation of the Commission's function under Section 13a(2).

Another question of substance is raised by the District Court's holding that the profits to be considered were the profits from both intra and interstate traffic on the branch line where the trains in question operated. It is noted that the District Court held that such profits amounted to $630,000.00, arriving at that figure by taking a system per mile average, including intrastate and interstate business everywhere—a completely unreliable method, resulting in an unrealistic conclusion as the Commission in its expertise would have recognized.

We know of no case supporting the District Court's action of using segment profits to outweigh an intrastate burden. The court relied heavily on *Chicago, Milwaukee, St. Paul & Pacific Railroad Company* v. *State of Illinois*, 355 U.S. 300, decided January 13, 1958, and *Public Service Commission of Utah* v. *United States of America*, 356 U.S. 421, decided May 19, 1958, to support its position on the weighing of profits. Those cases are not in point. They involved applications to increase intrastate rates because of their discriminatory nature, discrimination against interstate business. The Court held that the determination of whether there was *discrimination* depended in part upon a consideration of all intrastate business. In the instant case, the thrust of the statute is not against *discrimination*, but against waste which is *burdensome* to interstate commerce.

The District Court has obstructed the will of Congress and, in the initial stages of the interpretation of Section 13a, it has jeopardized an expert and uniform application of Section 13a(2) by the Commission.

It seems obvious that the lower court's holding that there is not "such relevant evidence as a reasonable mind might accept as adequate to support a conclu-

sion," as applied to the Commission's finding of undue burden on interstate commerce is simply another expression of the court's first finding that as a matter of law Section 13a(2) requires consideration of overall profits, and that it would be disposed of by this Court's interpretation of the meaning of Section 13a(2).

It is less obvious how the District Court could have arrived at the conclusion that the evidence and subsidiary findings did not support the Commission's ultimate finding that public convenience and necessity no longer requires the continued operation of the trains, without the court's weighing the evidence, balancing the loss against the need and substituting its own judgment for that of the Commission.

Apparently, the real reliance of the District Court, the real nub of its decision, was its determination that there existed such a tremendous and pressing need for the service that no reasonable person, Commission, or expert could possibly reach a conclusion that the need was slight and was outweighed by the loss. The law applicable to that issue seems to be well settled: If there is any reasonable ground for the conclusion of the administrative commission, the commission decision must be affirmed.

"The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line* v. *United States,* 292 U.S. 282, 286-7 (1934).

"It [the court] cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to *its* determination, if that has support in the record and

the applicable law." (emphasis ours) *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 536 (1946).

"In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling." *Interstate Commerce Commission* v. *Union Pacific Railway*, 222 U.S. 541, 547 (1912).

In consideration of the need for or the convenience of the service, the District Court, unlike the Commission, gave little, if any, weight to the undisputed facts showing the decline in use made by the trains over a period of years despite the growth of the area, the present slight interest in the trains by a few persons using them as a convenience to make a through connection on some of their interstate journeys, the abundance of other common carrier service readily available to them for those trips on which they use the trains. Against the slight inconvenience to a few passengers, the Commission weighed the out-of-pocket loss from operations, not less than $90,000.00 per year; the waste of manpower, nearly one railroad train and engine crewman per passenger; the fact that wages of engine and train crew were four times passenger revenues; and reached the conclusion that the public convenience and necessity permitted the discontinuance. That certainly was a conclusion which is within the bounds of reason.

Although reciting cases which have defined the scope of judicial review, the District Court abandoned the well settled principle of judicial restraint, by intruding

upon the Commission's function. Under the guise of determining the sufficiency of evidence, it substituted its judgment for that of the Commission as to matters within the latter's competence. The court weighed the evidence, omitted from its consideration some of that which was favorable to appellants, and substituted its judgment as to the weight to be given the evidence for that of the Commission.

The District Court thereupon sealed its substitution of its own opinion of the merits for that of the Commission by reversing the Commission's order and permanently and perpetually enjoining the discontinuance of the trains, instead of remanding the case for further action by the Commission pursuant to any rules of law laid down by the court.

The District Court's treatment of this case is so contrary to settled principles of judicial review of administrative orders that, if left standing, it would obfuscate the whole concept and severely handicap the Interstate Commerce Commission in the administration of the Interstate Commerce Act, particularly Section 13a, and it would deprive the railroad industry of any certainty as to its rights and duties under that section by permitting a lack of uniformity in the execution thereof, as demonstrated by different results obtained where Federal Courts have disposed of similar cases under Section 13a with proper observance of the settled principles of judicial review.

The setting aside of the Commission's order on the ground of insufficient evidence to support reasonable conclusions, viewed in the framework of the record in this case, constitutes, of itself, an obstruction to the enforcement of the statute and raises substantial ques-

tions for the determination of this Court as to by whom and what standards the issues of public convenience and necessity and undue burden on interstate commerce are to be decided in Section 13a cases.

CONCLUSION

The questions presented by this appeal are, for the reasons shown herein, substantial and of urgent importance to the public, the railroad industry generally and the regulatory authority. They are of national importance because of the principles involved and because of the effect of the decision of the court below on the administration of a new and important act of Congress.

It is respectfully submitted that probable jurisdiction should be noted.

WILLIAM T. JOYNER
P. O. Box 109
Raleigh, N. C.

EARL E. EISENHART, JR.
Southern Railway Company
P. O. Box 1808
Washington 13, D. C.

Counsel for Appellant

February 12, 1963.

APPENDIX A

The Opinion and Judgment of the Court Below

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

C-158-D-62

STATE OF NORTH CAROLINA; DUKE UNIVERSITY; THE DURHAM CHAMBER OF COMMERCE, INCORPORATED; RESEARCH TRIANGLE INSTITUTE; ERWIN MILLS, INC.; and MARY TRENT SEMANS,

Plaintiffs,

v.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; and SOUTHERN RAILWAY COMPANY,

Defendants.

Thomas Wade Bruton and Charles W. Barbee for State of North Carolina; E. C. Bryson for Duke University; F. Gordon Battle and Victor S. Bryant for Durham Chamber of Commerce and Research Triangle; A. H. Graham, Jr. for Erwin Mills; and E. C. Brooks, Jr. for Mary Trent Semans.

H. Neil Garson and William H. Murdock, District Attorney, for United States of America; H. Neil Garson for Interstate Commerce Commission; and Joyner and Howison, Major L. P. McLendon, James A. Bistline, and Earl E. Eisenhart, Jr. for Southern Railway Company.

Before BELL, Circuit Judge, and CRAVEN and PREYER, District Judges.

OPINION

L. RICHARDSON PREYER, District Judge.

This is an action brought under USC Title 28, Section 1336, in accordance with USC Title 28 Sections 1938, 2284 and 2321-2325. Its purpose is to set aside and enjoin enforcement of an order of the ICC granting South-

ern Railway Co. the right to discontinue all remaining passenger service between Greensboro, N. C. and Goldsboro, N. C. Acting under U.S.C. Title 49 Section 13a(2)[1], the Commission found that (1) the present or future public convenience and necessity permit such discontinuance, and (2) continuance of the operation would constitute an unjust and undue burden on interstate operations of the carrier and upon interstate commerce.

On July 18, 1959, Southern Railway Company filed a petition with the North Carolina Utilities Commission for discontinuance of its trains Nos. 13 and 16 which are the last passenger trains operating between Goldsboro and Greensboro, North Carolina. Actually, only one train is involved, it being designated No. 16 in one direction and No. 13 on the return trip.

Train No. 16 leaves Greensboro daily at 6:10 a.m., makes twelve regular stops and arrives in Goldsboro at 10:45

---

[1] Section 13a(2) provides that:

Where the discontinuance or change, in whole or in part, by a carrier or carriers subject to this part, of the operation or service of any train or ferry operated wholly within the boundaries of a single state is prohibited by the constitution or statutes of any state or where the state authority having jurisdiction thereof shall have denied an application or petition duly filed with it by said carrier or carriers for authority to discontinue or change, in whole or in part, the operation or service of any such train or ferry or shall not have acted finally on such an application or petition within one hundred and twenty days from the presentation thereof, such carrier or carriers may petition the Commission for authority to effect such discontinuance or change. (sic) When any petition shall be filed with the Commission under the provisions of this paragraph the Commission shall notify the Governor of the state in which such train or ferry is operated at least thirty days in advance of the hearing provided for in this paragraph, and such hearing shall (sic) in which such train and ferry is operated; and the Commission is authorized to avail itself of the cooperation, services, records, and facilities of the authorities in such state in the performance of its functions under this paragraph. (See Appendix D for correct text of Section 13a(2).)

a.m. Its principal stops are Burlington, Durham, Raleigh, and Selma.

Train No. 13 leaves Goldsboro daily at 4:05 p.m. and arrives in Greensboro at 8:50 p.m. with similar stops along the route.

A sleeping car is attached to the train and by connection with other trains at Greensboro, there is service to and from Washington, New York, and other major centers along the Eastern Seaboard.

These trains carry express but no freight or mail. The coaches have a capacity of 80 passengers. In addition, there is a 6 bedroom, ten-roomette sleeping car. There are six employees paid by the railroad servicing the train.

After hearings, the State Commission denied the application. Southern appealed to the North Carolina Superior Court, which affirmed the decision, and then to the Supreme Court of North Carolina which also affirmed. *Utilities Comm.* v. *R.R.*, 254 NC 73, 118 S.E. 2d, 21 (1961).

On April 16, 1962, Southern filed a petition with the Interstate Commerce Commission under Section 13a(2) of the Interstate Commerce Act, again seeking authority to discontinue the trains. The State of North Carolina and the other protestants were allowed to intervene.

The entire records of the hearings before the North Carolina State Utilities Commisson, the North Carolina Superior Court, and the North Carolina Supreme Court were made a part of the record for consideration by the Interstate Commerce Commission.

The proceedings were referred to an ICC Examiner who, after holding hearings, recommended that the discontinuance be allowed. On July 2, 1962, Division 3 of the ICC issued an Order adopting the findings and conclusions of the Examiner and authorizing the discontinuance of the trains. A petition for reconsideration was denied by the ICC. This action followed.

Issues Dismissed

At the threshold of the case, plaintiffs raise certain legal questions which, if meritorious, would require dismissal of the ICC Order without reaching the substantive aspects of the case. Specifically, plaintiffs attack the constitutionality of section 13a(2); they claim a defect in the giving of notice of the discontinuance, as required by law; they contend that a lease from the North Carolina Railroad Corporation to the Southern Railway Company requires the continuance of these operations; and they claim that the decision of the North Carolina Supreme Court is res judicata on the issues, and that the ICC cannot make a contrary determination without a showing of changes in the surrounding circumstances that occurred after the North Carolina Supreme Court decision. We think all of these arguments are without merit.

Plaintaiffs' attack on the constitutionality of section 13a(2) is without merit. The scope of the commerce power is such that there is little room for doubt of the constitutionality of an act allowing the ICC to eliminate intrastate operations that adversely affect interstate commerce. *Gibbons* v. *Ogden*, 9 Wheat. (22 U.S.) 16 L. Ed. 23 (1824); *Wickard* v. *Filburn*, 317 U.S. 111 (118), 63 S. Ct. 82, 87 L. Ed. 122 (1942); *Wisc. R.R. Com.* v. *Chicago, Burlington and Quincy R.R. Co.*, 257 U.S. 563, 42 S. Ct. 232, 66 L. Ed. 371 (1922); (589-590., *Colorado* v. *U.S.* 271 U.S. 153 (163, 165-166), 46 S. Ct. 452, 70 L. Ed. 878 (1926). We find section 13a(2) constitutional.

As to plaintiffs' claim of a defect in notice, it is clear that the claim is based on an oversight by the ICC in failing to change a reference in 49 CFR 43.6 when 49 CFR 43.5 was amended and renumbered. Section 13a(2) merely requires that the ICC notify the Governor of the state in which the train is operating. No further notice is required under section 13a(2) or under the commission regulations. We find that all requirements pertaining to notice have been met.

Plaintiffs further allege that the discontinuance of the trains in question would constitute a breach of the Lease Agreement between the Southern Railway Company and the North Carolina Railroad Company, dated August 16, 1895, and, consequently, that it is unlawful for the ICC to authorize such discontinuance. But no obligation to require the Southern to operate passenger trains over the lines leased from the North Carolina Railroad can be unambiguously spelled out of the lease. Furthermore, this issue was not raised before the ICC, and it should not be raised here for the first time. *Carolina Scenic Coach Lines* v. *United States*, et al, 56 Fed. Supp. 801 (803-804) (W.D. N.C. 1944); *Unemployment Comp. Com.* v. *Aragon*, 329 U.S. 143 (155), 67 S. Ct. 245, 91 L. Ed. 136 (1946); *Davis Administrative Law Treatise*, Section 20.06. Besides, the paramount power of Congress to regulate interstate commerce forces even express charter or lease provisions to give way before it. This has been held many times and is no longer in question. *Colorado* v. *United States*, 271 U.S. 153 (165-166) 46 S. Ct. 452, 70 L. Ed. 878 (1926); *Texas* v. *United States*, 292 U.S. 522, 531, 54 S. Ct. 819, 78 L. Ed. 1402 (1934); *Moeller* v. *Interstate Commerce Commission*, 201 F. Supp. 583 (S. D. Iowa, 1962); *Burke County, Georgia* v. *United States*, C.A. 1031 (S.D. Georgia, July 2, 1962, opinion not published).

Plaintiffs also seek to invoke the doctrine of res judicata to bar the ICC from considering the question of public convenience and necessity, alleging that this issue has been determined by the North Carolina Supreme Court in *State of North Carolina* v. *Southern Railway Company*, 254 N.C. 73, 118 S.E. 2d 21 (1961). This position cannot be sustained. Res judicata is a common law device to prevent litigation of matters already litigated between the same parties or those in privity with them. *United States* v. *California Bridge & C. Co.*, 245 U.S 337 (341), 38 S. Ct. 91, 62 L. Ed. 332 (1917). It is clear that a statute may change this common law rule. The statute before us, sec-

tion 13a(2), provides ". . . [W]here the State authority having jurisdiction thereof shall have denied an application . . . for authority to discontinue . . ., [the] carrier . . . may petition the [Interstate Commerce] Commission for authority . . . the Commission may grant such authority only after a full hearing and upon findings by it . . ." Since the statute requires the ICC to hold full hearings and to make findings, after a state decision, it seems quite clear that Congress did not intend for the state hearing to have res judicata effect. Cf. *Sprague* v. *Wall*, 7 Cir., 122 F. 2d 128 (1941); *NLRB* v. *Pacific*, 8 Cir., 228 F. 2d 170, 176 (1956). This interpretation is reinforced by the legislative history of section 13a(2) which shows that Congress was motivated by a belief that State authorities were unduly regressive in that they often required continuance of uneconomic and unnecessary service. (S. Rep. No. 1647, 85th Cong., 2d Sess. (1958), pp. 21-22, H.R. Rep. No. 1922, 85th Cong., 2d Sess. (1958), pp. 11-12). The conclusion follows that Congress did not intend the ICC to give State determinations res judicata or collateral estoppel effect.

We proceed to the substantive issue in the case.

Issues Involved

The central issue in the case is whether the order of the ICC authorizing discontinuance of the two trains is warranted in law and is supported by adequate findings based on substantial evidence of record.

Judicial review of an order of the ICC is limited. We may not set aside the ultimate findings of the Commission unless they are unsupported by substantial evidence on the record considered as a whole, involve error of law, or are arbitrary or capricious or constitute an abuse of discretion. Administrative Procedure Act, 5 U.S.C.A. § 1009(e); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 95 L. Ed. 456, 71 S.Ct. 456 (1950); *Carolina Scenic Coach Lines* v. *United States*, 56 F. Supp. 801, 804 (W.D. N.C. 1944), aff'd 323 U.S. 678, 65 S. Ct. 277, 89 L. Ed 550 (1944). It is not the

function of this court to appraise the conflicting testimony or other evidence, to judge the credibility of witnesses and to determine the weight of the evidence. A court "cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, that has support in the record and the applicable law." *U. S.* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 536, 66 S. Ct. 687, 90 L. Ed. 821 (1946). But the order must be reversed if the Commission in arriving at its determination departed from the applicable rules of law and if its finding was arbitrary and capricious and had no basis in substantial evidence on the record as a whole.

Plaintiffs contend that the conclusions of the Commission must fall because made under a mistake of law. Specifically, they argue that the Commission's conclusion that the continued operations would constitute "an unjust and undue burden upon the interstate operations of Southern Railroad and upon interstate commerce" was made without considering the over-all prosperity of the carrier and the total operations of the carrier on the line involved, and that in such failure lies error. We think plaintiffs' position is well-taken.

As a matter of law, we think that the ICC cannot be said to have made a proper finding unless it takes into account the profits that the Southern Railway makes in its freight operations on the same intrastate line. *Chicago, M. St. P. & PR. Co.* v. *Illinois*, 355 U.S. 300, 78 S. Ct. 304, 2 L. Ed 2d 292 (1958); *Public Service Com. of Utah* v. *United States*, 356 U.S. 421, 78 S. Ct. 796, 2 L. Ed. 2d 886 (1958). Unless this is taken into account, the full weight of the burden placed upon interstate commerce by these intrastate operations cannot be determined. *Chicago* and *Utah* cases, supra. At the time of the decision of the Supreme Court in *Chicago, M. St. P., P. R. Co.* v. *Illinois*, supra, Title 49 U.S.C. section 13(4) provided that the ICC

could change intrastate railway rates where they discriminated against interstate commerce in favor of intrastate commerce. The Supreme Court in the *Chicago* case held that the true nature of the burden on interstate commerce caused by discriminatory rates could not be assessed unless the other revenues in that state were taken into account. As stated by the Supreme Court (P. 305): "the occasion for the exercise of the federal power asserted by section 13(4) is the necessity for effecting the required contribution by intrastate traffic of its proportionate share of the revenues necessary to pay a carrier's operating costs and yield a fair return." In order to determine the burdens on interstate commerce caused by an intrastate loss, it is necesary to take into account intrastate profits. Cf. *North Carolina* v. *U. S.*, 325 U.S. 507, 65 S. Ct. 1260, 89 L. Ed. 1760 (1945).

If losses in an intrastate operation are so exceeded by profits of intrastate operation of the same general type in the same state, so as to pay operating expenses and yield a high profit, the net effect on interstate operations is not a burden on interstate commerce. If the ICC is then to cut off all of the intrastate operations that suffer a loss, while retaining all others, the result would be to require the intrastate operations to bear more than their share. The intent of Congress was to prevent burdens on interstate commerce, not require tribute therefor.

It must be remembered that the state has a legitimate interest in intrastate commerce—"intrastate rates are primarily the state's concern and federal power is dominant 'only so far as necessary to alter rates which injuriously affect interstate transportation.' *North Carolina* v. *U. S.*, supra, at 511 . . . [justification for the exercise of this exceptional federal power] must 'clearly appear'", *Chicago, M. St. P. & P. R. Co.*, supra. To find that segment of intrastate operations represents an ultimate "burden" upon interstate commerce without reference to the question of whether intrastate operations generally on the same line

make it such a burden might permit the entire field of intrastate operations to be federally arrogated by a separate treatment of segments unrelated to the net or total effects.

The *Chicago* and the *Utah* cases cited above are rate and revenue cases brought under section 13(4) rather than discontinuance cases under section 13a(2). It is clear, however, that section 13(4) cases furnish analogous authority for section 13a(2) cases. The "unjust and undue burden" standard contained in section 13a(2) derives from section 13(4) of the Act and from judicial decisions relating to the power of the Commission to prescribe intrastate rates which impose an unjust or undue burden on interstate commerce. In section 13a(2) Congress also intended to prevent burdens on interstate commerce by intrastate operations that do not bear their full share of costs and profit. S. Rep. No. 1647, 85th Cong., 2d Sess. (1958), pp. 21-22; H.R. Rep. No. 1922, 85th Cong., 2d Sess. (1958) pp. 11-12. Indeed, section 13a(2) cases stand in an a fortiori relationship to section 13(4) cases. For to allow passenger service to be abandoned, in this case altogether, as contrasted to raising passenger fares, involves a far more serious incursion upon the traditional rights of the states. See *Southern Railroad Co.* v. *South Carolina Public Service Company*, et al, 31 F. Supp. 707, 710, (E.D. S.C. 1940).

But defendants contend that the authority of the *Chicago* and the *Utah* cases cited above has been vitiated by the amendment to section 13(4), 75 Stat. 570 Pub. L. 85-625 section 4, an amendment which was keyed directly to these cases. The amendment was enacted on August 12, 1958; *Chicago* was handed down in January of 1958 and *Utah* in May of 1958. Section 13(4) was amended to allow the ICC to make a determination that intrastate railway rates discriminated against interstate commerce "without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the oper-

ations or results thereof of any carrier . . . wholly within any state."[2]

In our opinion, the amendment to section 13(4) does not overturn the existing law applicable to discontinuance cases. Section 13a(2) was enacted at the same time that section 13(4) was amended. At that time, the purpose of amending section 13(4) was fresh in the minds of Congress. If Congress had decided not to require the ICC to take into account the net result of the total operations of the intrastate lines in discontinuance cases as well as rate and revenue cases, it would have been easy to have amended

---

[2] Section 13(4) was amended by the addition of the underlined portions:

"Section 13, par. (4) Duty of Commission where State regulations result in discrimination. Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice caused any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate of foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against, *or undue burden on*, interstate or foreign commerce (*which the Commission may find without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results thereof of any carrier or group or groups of carriers wholly within any State*), which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as in its judgment, will remove such advantage, preference, prejudice, discrimination, *or burden* * * *".

proposed section 13a(2) just as section 13(4) was amended. This was not done.[3]

In any event, all that the major addition to section 13(4) does is to provide that the ICC "may . . . make their determination without a separation of interstate and intrastate property, revenues and expenses, and without considering in totality the operation or results thereof of any carrier . . . wholly within any state." This seems to mean that the Commission may decide without having to look into the above matter. However, where, as in this case, the matter was presented to the ICC, it would not seem likely that Congress intended the ICC to ignore these factors. The new provision indicates that the ICC may make a decision under section 13(4) without considering the totality of intrastate operations when the facts as to totality of intrastate operations have not been presented to the Commission by the parties. However, where they are presented, they should be taken into account. The permissive phraseology of the section would appear to us to mean that a decision of the Commission will not be upset simply because it fails to find specifically these facts where they have not been put in issue by the evidence before the Commission, but this does not mean that

---

[3] It has been argued that since Congress amended section 13(4) to add the words "undue burden", and at the same time enacted section 13a(2) using the words "undue burden", Congress intended that the new provisions of section 13(4) were to be applied to section 13a(2). In other words, the argument is that the new addition to section 13(4) became a definition of "undue burden". However, it would appear more likely that the major amendment to section 13(4) was a grant of additional power to the ICC in applying section 13(4), rather than a new definiton of "undue burden."

such facts where relevant and pertinent are not to be considered.[4]

---

[4] Another possible interpretation of the amendment is that it allows the ICC to make a change in rates without considering the overall statewide totality of a carrier's results—i.e. without considering *all* rates within a state—but does not mean that the totality of operations on the particular line in question should not be considered. See Conf. Report, Administrative News, 85th Cong. 2d Sess., at pps. 3484-5:

> "The amendment (to section 13(4)) deals only with the nature of the evidence to support such a finding. By two recent decisions of the Supreme Court (*Chicago, Milwaukee, St. Paul and Pacific Railroad Co.* v. *State of Illinois* (January 13, 1958), 355 U.S. 300, 356 U.S. 906, 78 S. Ct. 304, 665, and *Public Service Commission of Utah* v. *United States* (May 19, 1958), 356 U.S. 421, 78 S. Ct. 796, 2 L. Ed. 2d 886), the Commission is required to consider the entire State operation, freight and passenger, in determining whether or not the intrastate freight rates were causing an undue revenue discrimination against interstate commerce. If the holdings in these cases mean that the required finding of—
>
> undue, unreasonable, or unjust discrimination against or undue burden on, interstate or foreign commerce—
>
> can be made only in the light of the overall statewide totality of a carrier's operating results derived from its entire body of rates applicable within the State, it would preclude the Commission from making such a finding on a showing of only the effect of the particular rate or rates in question. The Commission could not, under such an interpretation, continue to function effectively in removing unjust discrimination against interstate commerce caused by interstate rates and charges. . . . The above three amendments to paragraph (4) of section 13 do not vest the Commission with jurisdiction that it does not have today but deal with procedures in the exercise of that jurisdiction better to strengthen the protection of interstate commerce as designed in this provision of the act."

This interpretation of the amendment to section 13(4) is the one adopted by the courts. In *Utah Citizens Rate Association* v. *United States,* 192 F. Supp. 12 (D. Utah 1961), the three judge court stated at p. 18 that "We believe that a matter of procedure rather than any substantive change in the basic transportation policy of the Congress is involved [in the amendment.] If this were not so, serious conceptual and constitutional; and further practical difficulties, would be invited. . . . The legislative history of the amendment bolsters this view." *Utah* was affirmed per curiam in 365 U.S. 649, 81 S. Ct. 834, 5 L. Ed. 2d 857 (1961).

It would, therefore, appear that when making a determination under section 13a(2) to discontinue one type of service on a line, where such facts are pertinent and relevant, and especially when such facts are before the Commission, the ICC must take into account the revenues from all services on the line. Without taking this into account, an interference of this nature into the completely intrastate affairs of any state based upon the burden that state has placed upon interstate commerce cannot be supported.

Both the Trial Examiner's Report and the decision of the ICC below indicate that they did not take this factor into account. The following appears at pages 11 and 12 of the Examiner's Report:

> "At the hearing, protestants emphasized the fact that petitioner's net railway operating income in 1960 was $36,107,699, and that its net income alone from freight operations on the line between Greensboro and Goldsboro averages $630,000, thus contending that the overall prosperity of the petitioner, as well as its intrastate freight operations, must be given effect in the disposition of the issues involved herein. With these contentions, the examiner disagrees."

On appeal, Division 3 of the ICC followed the Examiner's position (at pp. 4, 5):

> "But, interveners argue, petitioner's net income from freight traffic over the line is such that over-all profita-

ble operations result therefrom. It is their contention therefore, that the operation between Greensboro and Goldsboro cannot be held to be a burden upon interstate commerce. Their conclusion is that any application of section 13a(2) to a situation where an overall profitable operation is held to be a burden on interstate commerce results in an unconstitutional application of the provisions of the statute. In short, interveners allege that petitioner's net income from its freight operations over the line must be given effect when considering whether the continued operation of its passenger trains Nos. 13 and 16 will constitute a burden on interstate commerce. We think that such premise is contrary to the intent of Congress under the statute here involved. By analogy, interveners' view would require a determination that overall losses have resulted on traffic handled over the line. In that instance, however, petitioner could obtain adequate relief under the abandonment provisions of section 1(18) of the Act."

The ICC then states the rule to be as follows (p. 5):[5]

"Nowhere in section 13a(2) or elsewhere in the law is there any requirement that the prosperity of the intrastate operations of the carrier as a whole, or any particular segment thereof, must be given effect in determining whether the operation of an individual intrastate train imposed an unjust and undue burden on interstate commerce. To hold otherwise would be contrary to the apparent intent of the Congress.

The examiner and the ICC have misconstrued the intent of Congress and the contentions of the plaintiffs, as well as the applicable law. It is a non-sequitur to say that "by analogy, interveners' plaintiffs view would require a determination that overall losses have resulted on traffic handled

[5] Quoting from *Southern Pacific Co.—Partial Discontinuance of Passenger Trains, Los Angeles*, etc., 312 ICC 631.

over the line." Plaintiffs do not contend—and it is not the law—that there can be no discontinuance unless freight and passenger service considered together show a net loss. Rather, plaintiffs' contention is that the $630,000 freight profit is a factor to be considered in determining whether the $90,000 passenger loss on the same line constitutes an unjust and undue burden on interstate commerce. Whether there is a net profit or net loss is not necessarily the controlling factor, but the amount of the net profit or net loss is a factor to be considered. Whether the operation of the passenger service is a burden on interstate commerce and whether there is any longer a public need sufficient to justify the financial losses involved are questions not susceptible of scientific measurement or exact formulae but are questions of degree and involve the balancing of conflicting interests. All material factors bearing on the questions must be taken into account, the ICC must consider a fair picture.* Because Congress has expressed concern over

---

* See *Colorado* v. *United States*, 271 U.S. 153, 168-9; 70 L. Ed. 878, 885, (Brandeis, J): "In many cases, it is clear that the extent of the whole traffic, the degree of dependence of the communities directly affected upon the particular means of transportation, and other attendant conditions, are such that the carrier may not justly be required to continue to bear the financial loss necessarily entailed by operation. In some cases, although the volume of the whole traffic is small, the question is whether abandonment may justly be permitted; in view of the fact that it would subject the communities directly affected to serious injury while continued operation would impose a relatively light burden upon a prosperous carrier. The problem and the process are substantially the same in these cases as where the conflict is between the needs of intrastate and of interstate commerce. Whatever the precise nature of these conflicting needs, the determination is made upon a balancing of the respective interests—the effort being to decide what fairness to all concerned demands. In that balancing the fact of demonstrated prejudice to interstate commerce and the absence of earnings adequate to afford reasonable compensation are, of course, relevant and may often be controlling. But the act does not make issuance of the certificate dependent upon a specific finding to that effect."

the financial conditions of railway passenger service does not justify a reading of their intent to mean that if a segment of passenger service shows a loss, it is unnecessary to consider all other relevant factors, including the freight profits on the same line, to determine whether the loss constitutes a burden on interstate commerce.[1]

We hold, then, that the Commission should have considered the relative amount of profit on one service and loss on the other in making its finding of whether the passenger service here involved constituted an undue burden on interstate commerce.

Substantial Evidence on the Record

In order to allow discontinuance under section 13a(2) the Commission must find, based on substantial evidence on the record as a whole, that (a) the present or future public convenience and necessity permit of such discontinuance, and (b) the continued operation or service without discontinuance in whole or in part, will constitute an unjust and undue burden upon the interstate operation of such carrier or upon interstate commerce. Title 49 USC section 13a(2).

The use of the words "undue" and "unjust" must mean that there are permissible burdens, that is, "due" and "just" burdens. There is an interrelation between findings (a) and (b). To make a determination, the Commission must weigh the public convenience and necessity against the burdens.

What then is the public convenience and necessity to be served by this railroad.

The record discloses that the two trains in question are the last remaining east-west passenger trains between

---

[1] All relevant factors are considered in fixing freight rates. Southern has received six increases in freight rates since 1951, in all of which the size of passenger deficits were taken into account. ICC Record, Vol. 11, pp. 197-200.

Goldsboro and Greensboro, North Carolina. Until September 1954 Southern operated three pairs of passenger trains on this line. One pair of trains was discontinued in 1954 and another pair in 1958 which reduced the passenger service to trains Nos. 13 and 16 which are involved in this proceeding. The principal public convenience presently afforded by these trains arises from the interconnecting service at Greensboro with north-south trains on Southern's main line. The pullman service furnishes convenient overnight travel to New York and other East Coast cities, allowing a full working day to the traveler and thus conserving work time. A number of witnesses pointed out the superior convenience of this service to travel by air.

The City of Durham has the largest natural interest in the use of the trains, 46 per cent of the passengers embarking or leaving the trains there. This city has a population of 78,302. A witness for the railroad could recall only five cities in the United States with a population in excess of 70,000 that are without rail passenger service. The discontinuance of these trains would leave Durham County (1960 population 111,995), Alamance County (1960 population 85,674), and Orange County (1960 population 42,970) without any rail passenger service.[8] These three counties with a total population of 240,639 are located in the industrial Piedmont section of North Carolina.

The witnesses who testified at the hearings as to the need of these trains included:

1. Four members of the U. S. Army assigned to the Office of Ordnance Research located at Duke University who testified that the continuance of the trains was necessary for the satisfactory performance of their duties (relating to anti-missile missile work). Their individual annual use of the train was fifteen to twenty trips a year.

---

[8] Fifty of North Carolina's 100 counties are without passenger rail service. Durham County is ⅓ larger in population than the largest county without such service. Record before North Carolina Supreme Court, p. 259.

2. Two students at Duke University testified as to their and other students' use and need of the trains.

3. Professors from Duke University and the University of North Carolina who testified as to the need of the trains in carrying on their duties.

4. Patients at Duke Hospital who testified as to the medical necessity of the trains in getting to and from their home in New York to the hospital.

5. Testimony of a Research Chemist from Philadelphia, Pennsylvania, as to his use and need for the transportation.

6. A textile executive from New York City whose company owns a mill in Durham testified as to his necessity for the use of the trains.

7. The Director of Transportation for Burlington Industries, Inc., Burlington, North Carolina, testified as to the need for the trains both for employees of the company and for buyers, suppliers and technical people visiting the plants of the company.*

8. The President of the Research Triangle Institute, a recently established nonprofit organization providing research service to corporations, governmental agencies and foundations, testified as to the use and need of the trains by his staff, and that the continued operation of the trains was extremely important to the proper functions of his organization. The Institute staff consists of 86 full time members today; it is anticipated that this figure will be 170 by the end of 1962.

---

* 30-40 employees of Burlington Industries are "regular" users, averaging approximately one trip a month each. Customers and buyers (especially women buyers) also use the train. Burlington Industries has assisted Southern in the removal of other schedules and originally did not protest the discontinuance involved here. Subsequent studies of the company needs caused Burlington to reverse its position. ICC Record, Vol. 111, pp. 374-6.

9. The President of the Golden Belt Manufacturing Company of Durham testified as to his use and need of the train. This witness explained the necessity for train travel in the operation of his business.

10. The President of the Burlington Chamber of Commerce testified that rail passenger service was instrumental in the growth of Burlington and that the discontinuance of trains would seriously handicap the area.

11. A Burlington Executive testified as to the need for the trains by himself, his buyers, and his customers.

12. The Dean of Trinity College of Duke University, who made twenty to twenty-five trips a year himself, testified as to the need and convenience of the trains.

13. The Secretary of the Committee on Educational Institutions of the Duke Endowment testified that his work required use of these trains.

14. A Professor of Physics and a Member of the Advisory Committee of Reactor Safeguards, a part of the Atomic Energy Commission, testified that his work required the use of the trains at an average rate of a trip per month.

15. The President of Duke University testified to his use of the trains and that of his trustees and that their continuance was a matter of convenience and necessity. (He had made five trips to New York since the first of the year.)

16. The General Manager of the Jack Tar Hotel in Durham testified that the continued operations of the trains serve a necessary and convenient purpose for the guests who stay at his hotel and that the removal of the trains would not only be detrimental to efforts to attract conventions to Durham, but would inconvenience those persons attending such conventions.

17. The Director of Durham's Committee of 100 testified as to the need of the trains in locating and retaining industry in the Durham Area.

18. The President of the Southerland Dye and Finishing Plant at Mebane, North Carolina, testified as to his use of the trains and their need in his area.

19. The Office Manager of the Belk Leggett Department Store in Durham testified as to his store's need of the trains for sending buyers to New York. The buyers consist of a group of four to six people going to New York once a month, ten months out of the year.

20. There was evidence of the need of the service in the industrial development of the area from Justin Kingston, a New York textile executive, now building a plant in Durham to employ two hundred to three hundred employees; from the Director of Transportation for Burlington Industries; from George Watts Hill, Chairman of the Board of the Home Security Life Insurance Company and of the Durham Bank and Trust Company, and numerous others. In addition, one witness, Dr. Thomas Powell, a man with an investment of a million dollars in the biological supply business in Elon, North Carolina, testified that the loss of rail passenger service might cause that business to leave North Carolina.

21. Evidence indicated that there are three universities in or near Durham (two in Durham, one in Chapel Hill in Orange County). A total of 14,737 students attended these institutions in 1958-9 and attendance is steadily increasing. There are eight hospitals located in or near Durham. Six are within ten minutes by ambulance or auto from the Durham railroad passenger service. The other two, Butner and Memorial Hospital are within twenty to twenty-five minutes. These hospitals treated a total of over 431,000 patients in 1959.

To summarize, in addition to the need for the services by the general public, the testimony indicated the need existed as to four principal areas: industry, hospital, Duke University, and the U. S. Army.

The record indicates that the trains serve a growing area. The Durham-Burlington area is already heavily industrialized, with Burlington Mills and Western Electric predominating in Burlington, and the cigarette industry in Durham. In addition, in the opinion of Southern's General Industrial Agent "this area holds great promise in the field of industrial development . . . the new Research Triangle will give tremendous impetus to this growth and create ever-increasing industrial interest in this section." (Southern's freight traffic on the Greensboro-Goldsboro line may be expected to benefit accordingly.)

That this is a growing area would be meaningless if the growth was not reflected in increasing use of the trains. Southern points to a very large decline in passengers from the year 1948 (an average of 77.51 per trip) to 1960 (an average of 20.2 per trip). This decline would seem to reflect the general revolution in transportation caused by the shift in travel from railways to air, bus, and private car. This decline appears to have bottomed out, however, and recent figures indicate that the use of the trains is increasing with the growth of the area:

PASSENGERS[10]

	1959	1960	1961 (5 months)
Total	14,251	14,776	8,934
Daily Average	19.5	20.2	29.6
Average Passenger mile per train mile[11]	6.83	7.33	9.97

[10] These figures do not include any pass riders, which were estimated at the hearing before the State Utilities Commission at 80% of the total passengers.

[11] The evidence does not disclose the average number of passengers per train mile on the 55 mile portion of the line between Greensboro and Durham, although the principal public convenience presently afforded by trains Nos. 13 and 16 related to travel between these two cities. The line between Greensboro and Goldsboro is 129 miles long.

We note that the statute refers to "the present or *future* public convenience and necessity."

The increase in use may not be substantial (although it represents an increase of nearly 60 per cent in the daily average number of passengers patronizing these trains in the first five months of 1961 as compared with the entire year of 1959), but must be viewed in the light of Southern's failure to seek passengers. Plaintiffs accuse Southern of making a deliberate effort to discourage passenger service on the trains. Be that as it may, there is considerable evidence that Southern has done little, if anything, to promote greater use of these trains. The last advertising for the service before the commencement of these hearings occurred in 1951;[12] the president of the Research Triangle Institute testified that his asosciates did not know of the service until he told them. In contrast, there was testimony that Seaboard, with reference to its Raleigh service, actively advertised and solicited patronage and operated a well-staffed passenger office.

The ICC emphasized the availability of other means of travel to serve this area. There is good bus and air service, and the number of private automobiles is larger than the state-wide average. The fact of other methods of travel is a factor to be considered but it is not decisive. The statute speaks of convenience as well as of necessity. Also, the existence of *alternative* modes of travel in a heavily populated area should be considered a "convenience", and under some circumstances (such as air line strikes and bad weather) a "necessity."

What are the burdens imposed on interstate commerce by the operation of the trains?

The ICC found that the carrier's annual out-of-pocket savings resulting from the discontinuance of the two trains

---

[12] Six advertisements appeared in the Durham paper in 1960. ICC Record, Vol. 111, pp. 308, 335. The hearing before the North Caroline Public Utilities was on Oct. 6, 1959, and the decision was handed down on January 20, 1960.

would exceed $90,000 each year.[13] On this same line of track the railroad made a net freight operating profit of $630,000 in 1960.

Taking into account total operation of this line, there is a profit not a loss, a benefit, not a burden. The relative amount of profit on one service and loss on the other is a factor.

When we turn from this particular line to the overall operations of Southern Railway, we find that the over-all profit of Southern Railway in 1960 for its entire system was $30,702,542 after the payment of all taxes and all operating expenses. The figure for 1958 was $30,254,231 and for 1959 was $33,126,744.[14] The accumulated surplus of Southern in 1960 was $343,594,070. The effect of the losses of the Greensboro-Goldsboro passenger service on the financial structure of the railroad is inconsequential.[15]

---

[13] Plaintiffs contended that the maximum out-of-pocket loss was only $33,688 in 1960, while Southern contended it would exceed $117,640. The difference is largely accounted for by plaintiffs' giving effect to the 58 per cent state and federal income tax deduction resulting from the deficit operation, on the ground that this is a cost borne by the state and national governments and thus would not affect the financial condition of the railroad itself and therefore could not affect interstate commerce by weakening the railroad's capital structure. But uneconomical transportation is not rendered less so by passing a portion of the burden to Federal and State governments in the form of reduced income taxes . . . "an uneconomic outlay of funds would not be in the interest of transportation even though the money be derived from the national government." *Purcell* v. *United States*, 315 U.S. 381, 385 (1942). As far as the effect of the deficit operation on the shareholders and the financial structure of Southern is concerned, however, the argument carries weight.

[14] ICC Record, Vol. 11, p. 202.

[15] As to its effect on shareholders, the loss in 1960 reduced net profits by .0016% (after giving effect to state and federal income tax deductions).

The degree by which the loss impairs the ability of the carrier properly to serve interstate commerce is not substantial.

But it is unfair to compare the loss from a particular segment of a passenger rail line to the total profit of the company. Nor is this the test. The question is whether the particular segment of the railway involved is contributing its fair share to the over-all company operations, or whether its share constitutes a burden on the company and on interstate commerce. The evidence in the record is not clear or full on the question of whether this segment of the line is contributing its fair share to the over-all company operations, but the evidence points in the direction that the Greensboro-Goldsboro line contributes at least its fair share. For example, Southern's over-all passenger deficit in 1960 was $14,669,798 on its 2,913 passenger miles. The average loss per mile is then $5,035 on a system-wide basis. If we assume Southern's net operating passenger deficit on the Greensboro-Goldsboro line was $117,641 for 1960 (on a line of 130 miles); then the average loss per mile was $912.[16] The evidence further indicates that the average revenue per passenger mile in 1960 was .0305 for trains Nos. 13 and 16, as compared with a company wide average of .0296 and a North Carolina average of .0301, indicating a greater revenue per passenger mile on the Greensboro-Goldsboro line than on the Southern's operations as a whole.[17]

We find no comparative figures relating to freight profits in the record. The amount of the freight profits on the

---

[16] This figure is only approximate. Mr. Gleason testified that the $14,669,798 included all losses while the $117,641 was only the out of pocket losses resulting solely from the trains' operations. ICC Record, Vol. 11, pp. 209,211.

[17] For the first five months of 1961, the Greensboro-Goldsboro figures had fallen to .0274 compared to a company average of .0300. We find no figures for other years. ICC Record, Vol. 11, pp. 164-5.

Greensboro-Goldsboro line was apparently arrived at by taking 61 per cent of the Southern Railway's average freight profits per mile multiplied by the total Greensboro-Goldsboro mileage.

The burdens of a public utility must be viewed in light of the principle that a public utility cannot shut off all unprofitable service—it must continue to serve, even at a loss as to some operations when the public convenience and necessity do not permit the loss of the service. Mr. Justice Frankfurter, in *Ala. Public Serv. Com. v. Southern Ry. Co.*, 341 U.S. 341, 71 S. Ct. 762, 95 L. Ed. 1002 puts it:

> "Unlike a department store or grocery store, a railroad cannot of its own free will discontinue a particular service to the public because an item of its business has become unprofitable. . . . One of the duties of a railroad doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the State and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided because it will be attended by some pecuniary loss."

Upon our examination of the entire record, in the light of the applicable principles of law, we fail to find substantial evidential facts to support the Commission's holding that the service in question constitutes an undue burden on the interstate aspects of the carrier's operations. The basic facts are not in conflict—nor is there any real conflict in the evidence offered by the parties. The question is whether there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 229, 59 S. Ct. 205, 217, 83 L. Ed. 126 (1933); *Davis, Administrative Law Treatise*, Vol. 4, p. 186. We think there is not.

This court is specifically authorized by the Administrative Procedure Act (5 U.S.C.A. 1009) to "hold unlawful and set aside agency action findings and conclusions found to be arbitrary, capricious . . . or otherwise not in accordance with law . . . (or) unsupported by substantial evidence." By the provisions of Title 28, sec. 1336, jurisdiction is accorded to "set aside (or) annul any order of the Interstate Commerce Commission."

Pursuant to this authority, we hold unlawful and set aside the action of the Interstate Commerce Commission authorizing the carrier to abandon its passenger service. We also hold unlawful and set aside the ultimate conclusions of the Interstate Commerce Commission that the service in question constitutes an undue burden on interstate commerce and that the present or future public convenience and necessity permits such discontinuance. We hold that such action and conclusions are arbitrary and capricious because not in accordance with law and because not supported by substantial evidence.

We do not invalidate and do not set aside any of the subsidiary findings of fact made by the agency. Since we accord to them administrative finality, and since the record is complete bearing upon all aspects of the controversy, there would appear to be no occasion for remand. The procedure of remanding to an administrative agency is to afford the agency an opportunity to meet objections to its order by correcting irregularities in procedure, or supplying deficiencies in its record, or making additional findings, or supplying findings validly made to take the place of those invalidated.[18] None of these purposes would be served by remanding this case to the Interstate Commerce Commission for the simple reason that we have noted no irregularities in procedure and no important deficiencies in the record, and for the additional reason

---

[18] 2 Am. Jur. 2d, "Administrative Law" sec. 764.

that we have invalidated no subsidiary findings of fact but only ultimate conclusions of law and agency action.

Judgment for Plaintiffs

.....
U. S. District Judge

.....
U. S. District Judge

.....
U. S. District Judge

October , 1962.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

C-158-D-62

STATE OF NORTH CAROLINA, et al

v.

SOUTHERN RAILWAY COMPANY, et al.

ORDER

The above entitled cause coming on to be heard on the 13th day of September, 1962, and all parties thereto having appeared by counsel, and the court having heard the arguments of counsel and having reviewed the record, and upon due consideration thereof it appearing to the court that the plaintiffs should be granted the relief prayed for in their complaint, it is therefore on this the 19th day of October, 1962,

ORDERED, ADJUDGED AND DECREED that the Order of the Interstate Commerce Commission be set aside and that the defendant, Southern Railway Company, its officers,

agents and employees, be permanently and perpetually enjoined and restrained from discontinuing passenger trains, nos. 13 and 16 between Greensboro and Goldsboro, North Carolina.

The defendant, Southern Railway Company has until 12:00 noon, 24th day of October, 1962, in which to comply with this order.

It is further ORDERED, ADJUDGED AND DECREED that the defendant, Southern Railway Company, pay the cost of these proceedings to be taxed by the Clerk of this court.

.....
U. S. Circuit Judge

.....
U. S. District Judge

.....
U. S. District Judge

October 19, 1962.

A true copy—
L. RICHARDSON PREYER
District Judge

APPENDIX B

The Report and Order of the Interstate Commerce Commission

INTERSTATE COMMERCE COMMISSION

Service Date July 2, 1962

Finance Docket No. 21563

Southern Railway Company Discontinuance of Service between Greensboro and Goldsboro, N. C.

Decided June 27, 1962

Order issued granting petition of Southern Railway Company to discontinue the operation of trains 13 and 16 Between Greensboro and Goldsboro, N. C.

Arthur J. Dixon and *Earl E. Eisenhart* for Southern Railway Company.

F. Kent Burns for State of North Carolina and North Carolina Utilities Commission.

Robert B. Holton, W. J. Burton, Jr., and *R. L. Carnes* for railway labor organizations, protestants.

Claude V. Jones, Victor S. Bryant, E. C. Bryson, E. C. Brooks, Jr., A. H. Graham, Jr., and *Francis E. Walker* for other protestants.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS TUGGLE, HUTCHISON AND GOFF GOFF, COMMISSIONER:

Exceptions to the report of the hearing examiner recommending the granting of the petition have been filed jointly by the State of North Carolina, the North Carolina Utilitiies Commission, Duke University, Mrs. Mary Trent Seamans, Research Triangle Institute, and Erwin Mills, Inc., all interveners in opposition. Petitioner, Southern Railway Company has replied thereto. Oral argument requested by the interveners was denied by order of the Commission, Commissioner Tuggle dated February 12, 1962, served February 16, 1962.

By petition filed April 6, 1961, the Southern Railway Company, herein called petitioner or the carrier, a common carrier by railroad subject to Part I of the Interstate Commerce Act, requests authority under section 13a(2) of the act to discontinue the operation of its passenger trains Nos. 13 and 16 between Greensboro and Goldsboro, N. C. A hearing was held in Raleigh, N. C., of which the Governor of the State of North Carolina and the North Carolina Utilities Commission had notice. Briefs were filed and a report and recommended order by the hearing examiner was served on October 27, 1961. We are in accord with the examiner's findings of facts and ultimate conclusions thereon which we hereby adopt as our own and will not restate herein except to the extent necessary for clarity of discussion. However, we believe that we should set forth our views on certain of the issues presented.

Prior to the filing of the petition with this Commission, the carrier on July 8, 1959, filed an application with the North Carolina Utilities Commission for authority to discontinue the operation of the same trains in question here. After hearing, the North Carolina Commission concluded that there was insufficient competent evidence in the record upon which to base a finding that public convenience and necessity for the continuance of the trains no longer exists and thereupon issued its order of January 20, 1960, denying the application. On appeal, a judgment of the Superior Court of Wake County, N. C., sustaining the order of the North Carolina Utilities Commission, was affirmed by the North Carolina Supreme Court on February 3, 1961. *State of North Carolina, ex rel. Utilities Commission et al.* v. *Southern Railway Company*, 254 N. C. 73.

With this history of adjudication of the State proceeding in support of their argument, interveners at the hearing on the petition before us moved for dismissal asserting that the action is *res judicata*. The examiner has recommended that the motion be overruled and interveners on exceptions,

contend error, reasoning that the issue of public convenience and necessity had been clearly litigated between the parties in the prior proceeding and was finally determined by a court of competent jurisdiction when the Supreme Court of North Carolina issued its decision on February 3, 1961, affirming the findings of the Superior Court.

We certainly do not question either the competency or jurisdiction of the North Carolina Utilities Commission or the Supreme Court of that State in the prior proceeding and respect their decision in that matter. We also recognize the finality of the Court's decision on questions within its judicial sphere. However, the issue before us on petition by Southern is whether public convenience and necessity permits the discontinuance of operation of the trains in interstate commerce, a question arising under a Federal Statute (section 13a(2) of the Interstate Commerce Act). Proceedings of this nature are not dissimilar to abandonment proceedings presented before us. Of the latter cases, Justice Brandeis, speaking for the United States Supreme Court in *State of Colorado* v. *United States*, 271 U.S. 153, 165-166 said:

> Because the same instrumentality serves both, Congress has power to assume not only some control but paramount control insofar as interstate commerce is involved. It may determine to what extent and in what manner intrastate service must be subordinated in order that interstate service may be adequately rendered. The power to make the determination inheres in the United States as an incident of its power over interstate commerce. The making of this determination involves an exercise of judgment of the particular case. The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission.

It follows that the question of public convenience and necessity as it affects interstate commerce and which is presently before us was not determined in the prior State proceeding and the doctrine of *res judicata* obviously is not applicable to the newly created legal situation. Accordingly, the motion is denied.

Interveners allege further error by the examiner in recommending that 2 other motions to dismiss the petition be overruled, namely (1) that section 13a(2) of the Act is unconstitutional on its face and in its application; and (2) that petitioner failed to meet the applicable regulations regarding proper notice to the public.

As the examiner has pointed out, it is well established that an administrative agency is without power to pass upon the constitutionality of a federal statute which it is called upon to administer. See *Engineers Public Service Co.* v. *SEC*, 78 U.S. App. D.C. 199, 138 F. 2d 936, 952-953, dismissed as moot, 332 U.S. 788; *Paintz* v. *District of Columbia*, 72 App. D.C. 131, 112 F. 23, 39; *Todd* v. *SEC*, 137 F. 2d 475, 478 (6th Cir.); *Central Nebraska Public Power & Irr. Dist.* v. *FPC*, 160 F. 2d 782 (8th Cir.), certiorari denied 332 U.S. 765; and *Public Utilities Commission* v. *United States*, 355 U.S. 534, 539. But, interveners argue, petitioner's net income from freight traffic over the line is such that overall profitable operations result therefrom. It is their contention therefore, that the operation between Greensboro and Goldsboro cannot be held to be a burden upon interstate commerce. Their conclusion is that any application of section 13a(2) to a situation where an overall profitable operation is held to be a burden on interstate commerce results in an unconstitutional application of the provisions of the statute. In short, interveners allege that petitioner's net income from its freight operations over the line must be given effect when considering whether the continued operation of its passenger trains Nos. 13 and 16 will constitute a burden on interstate commerce. We think that such premise is contrary to the in-

tent of Congress under the statute here involved. By analogy, interveners' view would require a determination that overall losses have resulted on traffic handled over the line. In that instance, however, petitioner could obtain adequate relief under the abandonment provisions of section 1(18) of the Act. Section 13a(2) specifically empowers the Commission to authorize the discontinuance of trains upon finding that (a) the present and future public convenience and necessity permit of such discontinuance or change in whole or in part of the operation or service of *such train* or *ferry*, and (b) the continued operation or service of *such train* or *ferry* without discontinuance or change, in whole or part, will constitute an unjust and undue burden upon the interstate operations of such carrier or carriers or upon interstate commerce (underscoring supplied).

The legislative history of section 13a(2) indicates that the purpose thereof is to permit the discontinuance of the operation of services that "no longer pay their way and for which there is no longer any public need to justify the heavy financial losses involved." (S. Rep. 1647, 85th Cong.). (Emphasis supplied). In considering a somewhat similar contention, in *Southern Pacific Co.—Partial Discontinuance of Passenger Trains, Los Angeles, etc.*, 312 I.C.C. 631, we stated:

> "Nowhere in section 13a(2) or elsewhere in the law is there any requirement that the prosperity of the intrastate operations of the carrier as a whole, or any particular segment thereof, must be given effect in determining whether the operation of an individual intrastate train imposes an unjust and undue burden on interstate commerce. To hold otherwise would be contrary to the apparent intent of the Congress."

Nothing has been submitted herein to warrant a change in this view.

Nor can we agree with interveners that the petition in this proceeding should be dismissed for petitioner's failure

to observe the rule included in our order of November 12, 1959, requiring the posting of notice of the proposed discontinuance in each station, depot or other facility involved. While the statute clearly requires such posting of notice in proceedings instituted under section 13a(1), the statute is equally clear in not providing for such requirement under paragraph 2:

> "When any petition shall be filed with the Commission under the provisions of this paragraph the Commission shall notify the Governer of the State in which such train or ferry is operated at least 30 days in advance of the hearing provided for in this paragraph, and such hearing shall be held by the Commission in the State in which such train or ferry is operated; * * *."

It is further apparent that the inclusion of the requirement regarding the posting of notice in our order of November 12, 1959, and the resultant conflict between that order and section 13a(2) was caused by an obvious error in not amending section 43.6 to conform to the relettering of section 43.5 of our order[1] of the above date. Since petitioner complied with the rules and regulations promulgated by our order of August 14, 1958, and since there was no intent that our subsequent amending order of November 12, 1959, impose an additional requirement regarding notice upon petitioners in proceedings under section 13a(2), and since no specific evidence has been introduced to show that the position of any of the parties has been prejudiced or materially affected by our error, the motion of interveners is denied.

Interveners' exceptions include other assignments of error to the examiner (1) in computing the revenues and

---

[1] This oversight was corrected by the issuance of the Commission's order of November 28, 1961 (Ex Parte No. 217) in which section 43.6 was amended to eliminate reference to paragraph (j) of section 43.5.

expenses of operation of the trains involved, (2) in failing to give sufficient weight to the overall prosperity of the petitioner when considering whether continuance of the operation would constitute an undue burden on interstate commerce, (3) in failing to consider the increase in the average number of patrons in 1960 and the period of 1961 over the number of passengers utilizing the service in 1959, (4) in failing to recognize that petitioner had allowed service along and over the line to decline in order to present a plausible case for the abandonment of passenger service, and (5) in concluding that future industrial expansion of the area is not dependent upon existing rail passenger service.

In his determination of the financial results of operation the examiner has allowed or disallowed certain items of expense consistent with our prior decisions in similar discontinuance proceedings. Interveners have assailed the methods utilized in approximating certain cost items where the actual expense cannot be determined. However, they have offered no substitute formula whereby a more accurate determination may be made. Under the circumstances we will rely on the methods which have been acceptable to us in the past.

The contention that the overall prosperity of the petitioners must be given effect in the disposition of the issues involved herein has been adequately discussed in our consideration of one of interveners' motions and no further clarification of our position in that matter is necessary.

The fact has not been overlooked that there has been an increase of nearly 50 percent in the daily average number of passengers patronizing these trains in the first 5 months of 1961. The record also discloses that the increase in the 1961 period was due largely to an increased number of group movements of school children. However, despite the increase in patronage during the first 5 months of 1961, passenger revenues during that period amounted

to only $10,653 or approximately $26,000 less than train and engine crew wages.

The evidence of record fails to support interveners' contention that petitioner has deliberately discouraged the use of the trains as a part of its plan to present a plausible case for discontinuing passenger service over the line. Neither the present nor prospective traffic on the line would justify the use of expensive or ultramodern equipment and, as stated by the examiner, we have repeatedly held that prospective patrons who must be coaxed to use a service have no urgent need for it.

We have also expressed the view that while industrial expansion may, under certain circumstances, depend upon the existence of rail passenger service, it would appear that prospective industries are much more interested in freight service than rail passenger facilities. See *Chicago, M. St. P. & P. R. Co. Discontinuance of Service,* 307 I.C.C. 565, 578 and *Chicago & N. W. Ry. Co. Discontinuance of Service,* 307 I.C.C. 775, 782.

From a review of the evidence of record we conclude that the cost to the carrier of operating the trains involved greatly exceeds the benefit derived from said trains by the traveling public; that existing alternate transportation service by rail, bus, airline and motor truck are reasonably adequate for the transportation of passengers, and express; that the public will not be materially inconvenienced by the discontinuance of the service here involved; that the savings to be realized by the carrier outweigh the inconvenience to which the public may be subjected by such discontinuance; that such savings will enable the carrier more efficiently to provide transportation service to the public which remain in substantial demand; and that the continued operation of trains Nos. 13 and 16 would constitute a wasteful service and would impose an undue burden on interstate commerce.

We have heretofore concluded that we have no authority under section 13a(2) to impose conditions for the protec-

tion of rail employees adversely affected by the discontinuance. While it is recognized that the probable adverse effect upon employees is a factor to be considered in determining public convenience, such probable adverse effect in the present proceeding does not afford a sufficient basis to justify continued operations of the involved trains.

Contentions of the parties as to either law or fact not specifically discussed herein have been given consideration and found to be without material significance or not justified.

We find that the present and future public convenience and necessity permit the discontinuance of service by the Southern Railway Company of its passenger trains Nos. 13 and 16 between Greensboro and Goldsboro, N. C., and that the continued operation thereof would constitute an unjust and undue burden upon the inferstate operations of that carrier and upon interstate commerce.

An appropriate order will be entered.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 27th day of June, A.D. 1962.

Finance Docket No. 21563

SOUTHERN RAILWAY COMPANY DISCONTINUANCE OF SERVICE BETWEEN GREENSBORO AND GOLDSBORO, N. C.

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held, and said Division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions of law, which report is hereby referred to and made a part hereof:

It is ordered, That interveners' motions to dismiss the proceeding be, and they are hereby denied.

It is further ordered, That the petition of the Southern Railway Company to discontinue the operation of the passenger trains specified in the aforesaid report be, and it is hereby, granted.

It is further ordered, That this order shall be effective 20 days from the date of service hereof; and

It is further ordered, That if the authority herein granted is not exercised within one year from the effective date thereof, it shall be of no further force or effect.

By the Commission, division 3.

HAROLD D. MCCOY,
Secretary.

(SEAL)

APPENDIX C

The Recommended Report and Order of the Interstate Commerce Commission's Hearing Examiner, with Certain Exhibits Attached, Adopted as Part of the Commission's Report

INTERSTATE COMMERCE COMMISSION

Served October 27, 1961

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all other parties in interest within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of such exceptions. At the expiration of said period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions have been seasonably filed or the order has been stayed or postponed by the Commission. If exceptions are filed, replies to exceptions may be filed within 20 days after the final date for filing of exceptions. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice or order to that effect, has been served.

Finance Docket No. 21563

SOUTHERN RAILWAY COMPANY
DISCONTINUANCE OF SERVICE BETWEEN
GREENSBORO AND GOLDSBORO, N. C.

Decided.....

---

(1) Motions of protestants to dismiss proceeding overruled.

(2) Order granting petition of Southern Railway Company to discontinue the operation of trains 13 and 16 between Greensboro and Goldsboro, N. C.

Arthur J. Dixon and *Earl E. Eisenhart* for Southern Railway Company.

F. Kent Burns for State of North Carolina and North Carolina Utilities Commission.

Robert B. Holton, W. J. Burton, Jr., and *R. L. Carnes* for railway labor organizations, protestants.

Claude V. Jones, Victor S. Bryant, E. C. Bryson, E. C. Brooks, Jr., A. H. Graham, Jr., and *Francis E. Walker* for other protestants.

REPORT AND ORDER

RECOMMENDED BY WILLIAM J. GIBBONS, HEARING EXAMINER

On April 6, 1961, the Southern Railway Company, a common carrier by railroad subject to Part I of the Interstate Commerce Act, filed a petition under section 13a(2) of the Act for authority to discontinue the operation of trains Nos. 13 and 16 between Greensboro and Goldsboro, N. C. A hearing was held in Raleigh, N. C. on July 11 through July 14, 1961, of which the Governor of the State of North Carolina and the North Carolina Utilities Commission had notice. The Southern Railway Company will be referred to herein as the "petitioner", the railway labor organizations and their representatives as "employees", and all other parties, including the State of North Carolina and the North Carolina Utilities Commission, will be referred to as "protestants". The proceeding has been referred to the examiner who presided at the hearing for a recommended report and order. Briefs have been filed.

On July 8, 1959, the Southern Railway Company filed an application with the North Carolina Utilities Commis-

sion for authority to discontinue the operation of the same trains that are involved in this proceeding. After hearing, the North Carolina Commission issued its order dated January 20, 1960, denying the application. On appeal, a judgment of the Superior Court of Wake County, N. C., affirming the order of the North Carolina Utilities Commission, was affirmed by the North Carolina Supreme Court on February 3, 1961. *State of North Carolina, ex rel. Utilities Commission et al.* v. *Southern Railway Company,* 254 N.C. 73.

At the outset of the hearing, protestants filed three separate motions to dismiss the proceeding on the grounds that (1) section 13a(2) is unconstitutional, (2) the decision of the Supreme Court of North Carolina which sustained the order of the State Commission is res judicata, and (3) no proper notice of the hearing was given as required by law.

It is well established that an administrative agency is without power to pass upon the constitutionality of a federal statute which it is called upon to administer. See *Engineers Public Service Co.* v. *SEC,* 78 U.S. App. D.C. 199, 138 F. 2d 936, 952-953, dismissed as moot 332 U.S. 788; *Panitz* v. *District of Columbia,* 72 App. D.C. 131, 112 F. 23, 39; *Todd* v. *SEC,* 137 F. 2d. 475, 478 (6th Cir.); *Central Nebraska Public Power & Irr. Dist.* v. *FPC,* 160 F. 2d 782 (8th Cir.), certiorari denied 332 U.S. 765; and *Public Utilities Commission* v. *United States,* 355 U.S. 534, 539.

With respect to the second motion to dismiss, it is the position of protestants that the matter has been conclusively adjudicated by a court of competent jurisdiction and that all parties are bound by such determination in the absence of an allegation or showing of a change of conditions, and since no change in conditions has been alleged or shown, the decision of the Supreme Court of North Carolina, *supra,* is res judicata.

In the past, this Commission has superseded court decisions when the applicable statute clearly indicated that it should do so. *Chicago, S. S. & S. B. R.* 234 I.C.C. 34; *Street Elect. Ry. & M. Coach Employees* v. *C., A. & E. R. Co.* 234 I.C.C. 201; and *Sprague* v. *Woll*, 122 F. 2d 128, certiorari denied 314 U.S. 669. The jurisdiction of this Commission over the subject matter of this proceeding has been established by virtue of the denial of petitioner's application by the North Carolina Commission and the subsequent filing by petitioner of the petition herein. After the jurisdiction of this Commission has been properly invoked, section 13a(2) contemplates that the matter be tried de novo and that the prior determination by the appropriate State authority is of an advisory nature only, having no binding effect upon this Commission.[1] To hold otherwise would render section 13a(2) ineffectual or wholly inoperative. Moreover, section 13a(2) raises an issue with respect to the burden on interstate commerce, an issue which neither the North Carolina Commission nor the North Carolina Supreme Court was empowered to determine. The doctrine of res judicata does not preclude relitigation when a new or different claim or issue is presented. For the above reasons, the examiner concludes that this Commission is not bound by the order of the North Carolina Commission or by the State Court decisions which affirmed that order.

Protestant's third motion to dismiss is based upon the ground that petitioner did not post notices of its proposed discontinuance in its stations, depots and passenger cars as required by law. In support of this motion, they contend that the applicable regulations (49 CFR 43.1) specifically state that the rules apply to a "notice" under sec-

[1] Section 13a(2) provides, among other things, that this Commission "is authorized to avail itself of the cooperation, services, records and facilities of the authorities in such State in the performance of its functions under this paragraph."

tion 13a(1) of the Act, or to a "petition" under section 13a(2), and further that section 43.5(j) of the regulations requires that a copy of the notice of the proposed discontinuance be posted "in a conspicuous place in each station, depot or other facility involved, including each ferry and each passenger car . . ." (49 CFR 43.5(j)).

It is to be observed that the regulations define the term "notice" as a notice provided for in section 13a(1) of the Act, and the term "petition" as a petition filed under section 13a(2). (49 CFR 43.2). Section 43.5 of the regulations, paragraphs (a) through (k), specifically applies to a "notice" in a section 13a(1) proceeding, and section 43.6, paragraphs (a) through (d) specifically applies to a "petition" in a 13a(2) proceeding.[2]

Among other things, section 43.6 provides that petitions for authority to effect the discontinuance of a train shall contain information required by section 43.5 excepting paragraph (i) thereof. (49 CFR 43.6). By requiring all other information contained in section 43.5 excepting paragraph (i), section 43.6 would appear to require the carrier to comply with the notice posting requirement of section 43.5(j).

Despite the language of section 43.6, such a requirement on the part of the carrier was never intended in a section 13a(2) proceeding. As originally issued by this Commission on August 14, 1958, paragraph (i) of the section 43.5 contained the requirement with respect to the posting of notices in a section 13a(1) proceeding, and section 43.6, relating to petitions, required the information set forth in section 43.5 excepting paragraph (i) thereof. (23 F.R. 6378, August 20, 1958). Thus, it is clear that, as originally issued, the applicable regulations did not require that the notice called for in a section 13a(1) proceeding be required in a section 13a(2) proceeding.

---

[2] Sections 43.7 and 43.8 apply to notices and petitions.

By subsequent amendments to the regulations on November 12, 1959, a new paragraph (i) was added to section 43.5 and the then existing paragraph (i) was amended and redesignated paragraph (j). (25 F.R. 434, January 20, 1960). No amendment or change in section 43.6 was made at that time and through inadvertence or as a result of an apparent mishap, the reference to paragraph (i) was retained in section 43.6 when it (paragraph (i)) should have been relettered paragraph (j). Thus, the only conclusion that can be drawn from the administrative history of the applicable regulations as well as from the contemporaneous construction placed thereon by this Commission is that the type of notice required in a section 13a(1) proceeding is not required in a section 13a(2) proceeding. In this connection, see *Pennsylvania R. R. Co.—Discontinuance of Passenger Service, Camden-Pemberton, N. J.*, F. D. No. 20553, decided June 6, 1960. To interpret the regulations differently would be inconsistent with the obvious intent expressed in sections 13a(1) and 13a(2) of the Act.

For the reasons stated, the 3 motions of protestants above-described to dismiss this proceeding should be overruled.

The trains sought to be discontinued, hereinafter identified as trains 13 and 16, operate daily between Greensboro and Goldsboro, a distance of 129.1 miles. As presently scheduled, eastbound train 16 leaves Greensboro at 6:10 a.m., and arrives at Goldsboro at 10:45 a.m., serving 12 intermediate stations on regular stops and 9 stations on flag stops. Train 13 leaves Goldsboro at 3:05 p.m., and arrives at Greensboro at 7:50 p.m., serving 10 regular intermediate stations and 11 flag stops. These are the last two passenger trains operating in an east-west direction between Greensboro and Goldsboro. Appendix A hereto shows the schedules of the trains, the regular stops, flag stops and the populations of the cities and towns served by the trains.

The trains regularly consist of a 1500-horsepower diesel electric locomotive, a passenger coach, and a combination car for passengers, baggage and express. In addition, on the portion of the run between Raleigh, N. C., and Greensboro, each train handles a sleeping car which, in turn, is handled on other passenger trains of petitioner between Greensboro and Washington, D. C., and on trains of the Pennsylvania Railroad between Washington and New York City, thus providing through sleeping car service between Raleigh, Washington, Philadelphia and New York City. The trains carry express but no mail. The trains are operated by a 5 man railroad crew consisting of an engineer, fireman, conductor, flagman, and brakeman. Although one crew makes a round trip, two crews are necessary in the operation because of limitations on the number of working days. In addition, a pullman conductor and a porter work the sleeping cars and an express messenger works the trains 5 days a week.

During the periods indicated below, the total number of passengers carried on trains 13 and 16, the daily average on each train and average passenger mile per train mile were as follows:

Passengers

	1959	1960	1961 (5 mos.)
Train 13	6,462	7,076	4,384
Train 16	7,789	7,700	4,550
Total	14,251	14,776	8,934

Daily Average

	1959	1960	1961 (5 mos.)
Train 13	17.7	19.3	29.0
Train 16	21.3	21	30.1
Total	19.5	20.2	29.6

Average Passenger Mile Per Train Mile

	1959	1960	1961 (5 mos.)
Train 13	6.51	7.16	10.67
Train 16	7.16	7.50	9.27
Total	6.83	7.33	9.97

Appendix "B" shows the on-and-off passenger count at each station for train 13 in 1960 and the daily average at each station. Appendix "C" shows similar data with respect to train 16 in 1960. In 1959 and in the first 5 months of 1961, the pattern of entrainment and detrainment was substantially the same as in 1960. As shown by these statistics, the overwhelming majority of the stations served averaged less than 1 passenger a day boarding train 13 or 16. Of the total passengers (7076) carried by train 13 in 1960, 989 passengers entrained at Goldsboro, 826 at Raleigh, 2,929 at Durham and 1,464 at Burlington, and 5,048 passengers detrained at Greensboro. Of the total passengers (7,700) carried by train 16 in 1960, 5,101 entrained at Greensboro, 112 at Burlington, 775 at Durham and 667 at Raleigh. All but 1,279 of these passengers on train 16 detrained before reaching the end of the line at Goldsboro, the heaviest detrainment (2,712) occurring at Durham, and at Burlington and Raleigh, with 1,275 each.

In 1948, both trains carried 56,739 passengers an average of 77.51 per trip, as compared with a total of 14,776, or an average of 20.19 per trip, in 1960. During the same period, total passenger revenues declined from $60,534, or an average passenger revenue of $82.70 per trip, to $21,135 or $28.87 per trip. In 1959, 1960 and during the first 5 months of 1961, the average revenue per passenger was respectively, $1.39, $1.43, and $1.19. Each train earns from 21 to 22 cents per train mile in passenger revenue, and about 34 cents per train mile in express revenue.

As shown by petitioner's exhibits, the revenues derived from the operation of the trains in 1959, 1960, and the first 5 months of 1961, the direct expenses incurred in connection therewith and the expenses in excess of revenues were as follows:

	1959	1960	1961 (5 mos.)
Revenues			
Passenger	$19,839	$21,135	$10,653
Express	$31,875	$31,630	$ 4,697
Miscellaneous	$ 356	$ 336	$ 140
Total Revenues	$52,070	$53,101	$15,490
Direct Expenses	$174,907	$170,742	$70,321
Expenses in excess of Revenues	$122,837	$117,641	$54,831

Appendix D shows the details of the operating results for both trains for 1960. Similar data is of record for 1959 and for the first 5 months of 1961.

Passenger revenues are actual as determined from the tickets collected by conductors, showing station to station travel, the class of passage and the type of ticket used. When interline travel is involved, revenues are determined on a mileage pro rate. Miscellaneous revenues represent actual revenues received for the handling of newspapers, and express revenues are computed by the application of the system average revenue per carfoot mile to the carfoot miles assigned to trains 13 and 16. As to the computation of expenses, the wages of train and engine crews, vacation allowances, payroll taxes, and equipment rental are actual as shown by petitioner's books and records. Train fuel expenses were determined by applying the system average cost per gallon to the number of gallons of fuel consumed by these trains during a test period. Net losses from the operation of the sleeping car represents the excess of expenses over revenues between Raleigh and Greensboro, as billed to petitioner by the Pullman Company. Locomotive expenses are computed on the system average cost per diesel locomotive unit mile, and passenger car expenses are determined on a system average cost per passenger car mile. The joint facility expenses at the Goldsboro Union Station are computed on the basis of the number of cars moving in and out of the station.

Expenses resulting from damage to livestock and injuries to persons, incurred in 1960 and 1961, are actual. Neither of these expenses was incurred in 1959. Excluded from the carrier's operating costs are expenses for maintenance of tracks and structures, depreciation on equipment, traffic and supervisory expenses, property taxes, and general expenses. Other financial data presented by petitioner shows that system off-line revenues derived from the trains sought to be discontinued amounted to $73,960 in 1959 and $83,034 in 1960. After reducing these amounts by 50 percent as the cost of producing the revenue, the net feeder value of trains 13 and 16 was $36,980 and $41,517, respectively, in 1959 and 1960.

As a result of the discontinuance of these trains, petitioner claims that it will realize savings of $122,837, which is equivalent to its out-of-pocket loss in 1959. In addition, it estimates that it will save another $15,015 annually, made up of station expenses ($4,046), rental for lease of property at Burlington ($6,820), and heat and light in various stations ($4,149).

With respect to other available methods of transportation, petitioner submitted data to show that 15 motor buses operate daily in each direction between Greensboro and Raleigh and 8 between Raleigh and Goldsboro, with 2 daily scheduled operations in through service between Greensboro and Goldsboro. In addition, local bus service is available twice a day in each direction between Raleigh and Durham. Most of the buses in the area provide through service to and from points beyond the terminals of trains 13 and 16, in addition to providing local service. Of the 23 stations served by trains 13 and 16, McLeansville, Glen and Rose are the only stations not directly served by motor bus.

Other rail passenger service is available at 4 stations now served by trains 13 and 16. At Greensboro, 7 trains of the petitioner in each direction provide daily service, and at Raleigh 6 daily trains of the Seaboard Airline Rail-

road are available in each direction. The Atlantic Coast Line Railroad operates 3 passenger trains daily in each direction through Selma, and 1 train a day through Goldsboro. These trains provide through service, including pullman accommodations, to and from, among other points, Washington, D. C., New York City, Atlanta, Ga., Birmingham, Ala., and Richmond, Va. In addition, daily air line service is available between the Raleigh-Durham and the Greensboro-High Point Airports and Washington, D. C., New York, Philadelphia, Chicago and other major cities.

At present most of the express traffic originating at and destined to Greensboro, Burlington, Durham, Raleigh, Selma and Goldsboro is handled by over-the-highway motor trucks of the Railway Express Agency, although it can still be transported via trains 13 and 16. At 8 of the smaller communities, which the Railway Express Agency is not presently authorized to serve by truck, express service is provided exclusively by trains 13 and 16. In the event the trains are discontinued, the Railway Express Agency proposes to handle all of the express by motor truck. In addition, other passenger trains previously mentioned herein provide express service at Greensboro, Raleigh, Selma and Goldsboro, and various bus lines in the area offer a limited express service.

For the most part, the 7 county-area through which the trains operate is traversed by a network of paved, all weather highways, at least one of which substantially parallels petitioner's railroad. Most of the communities served by the trains are located on improved highways or in close proximity thereto. In the area served by the trains, there is an average of one passenger automobile for every 2.9 persons as compared with an average for the entire State of one automobile for every 3.3 persons.

At the hearing before the North Carolina Public Utilities Commission, 18 public witnesses testified as to the need for the service provided by trains 13 and 16. In the instant proceeding, testimony was offered by 21 witnesses,

most of whom use the trains with varying degrees of frequency. Many of the witnesses testified as to the use of the trains by members of their families, their employees and associates. Fifteen of the opposition witnesses, including college professors, research scientists, business executives and government employees, came from the Durham area or had an interest there, and 3 were business men from Burlington. Their use of the trains is primarily for travel on the sleeping car between Durham or Burlington and Washington, D. C., Philadelphia, New York City and other intermediate points.[3] For personal convenience or because of medical necessity, these persons use the trains instead of other available modes of transportation. One witness expressed concern about express service to and from Elon College,[4] while others feared that the discontinuance of these trains would hamper the industrial development of the area. Through oral testimony, petitioner denied that the presence or absence of rail passenger service has any bearing on industrial development.

Other evidence or (sic) protestants relates to the uncleanliness of the passenger stations on the line, and the deterioration of service generally, including the lack of dining facilities on the trains, the failure of petitioner to pre-cool the cars in the summertime and to properly heat them in the wintertime, and difficulties encountered in securing reservations. At the hearing, protestants took the position that poor service and lack of modern facilities, plus petitioner's failure to advertise or solicit business, are primarily responsible for the reduction in passenger patronage. As against this, petitioner contends that its passenger facilities are clean, comfortable and modern,

---

[3] Durham and Burlington are 55 and 21.4 rail miles, respectively, from Greensboro, at which point the Pullman car on trains 13 and 16 is switched to and from other trains of petitioner.

[4] For sometime in the past, express service at this station has been provided by truck.

and that in the past efforts to attract additional patronage through advertising and solicitation have been unproductive.

Both at the hearing and on brief, protestants assail the method used by petitioner in computing many of its expenses on the basis of system averages. In the past this method of computing locomotive and passenger car expenses has been approved in train discontinuance proceedings as reasonably approximating the actual expenses incurred. *Louisville & N. R. Co., Discontinuance of Service*, 307 I.C.C. 173, and *Missouri Pac. R. Co., Discontinuance of Service*, 307 I.C.C. 787. As to the expenses at the Union Station in Goldsboro, these expenses are actual and will be savable to petitioner, since trains 13 and 16 are the last trains of petitioner using that terminal. Upon the discontinuance of the trains herein, the terminal expenses at Goldsboro would undoubtedly be redistributed among other carriers using the terminal. Since the terminal expense of the petitioner at Goldsboro amounts to about $7,000 annually,[5] it does not appear that the redistribution thereof will impose an undue burden upon other carriers in interstate commerce. In this connection, see *Wabash Railroad Company Discontinuance of Service Between Toledo, Ohio, and Fort Wayne, Ind.*, F. D. No. 20710, decided November 30, 1959.

It is doubtful that full recognition should be accorded to expenses for damage to livestock and injury to persons, since neither of these recur with sufficient regularity to treat them as part of petitioner's normal operating expenses. Inasmuch as both items of expense are insubstantial, the exclusion of them from petitioner's operating results will not alter the ultimate findings made herein.[6]

---

[5] Terminal expenses at Goldsboro were $6,350 in 1959 and $6,940 in 1960.

[6] In 1960 expenses for injuries to persons were $500 and for damage to livestock $50. In 1961 expenses for injuries to persons was $3,500. Neither of these expenses was incurred in 1959.

Except for these, the remaining expenses presented by petitioner are directly attributable to the operation of the trains and appear to be proper and fairly realistic.

In determining the net feeder value of these trains, the protestants contend that the reduction of the gross system-connected revenues by 50 percent, as representing the cost of producing such revenues, is purely speculative. Protestants, however, suggest no alternative cost formula. In rail abandonment proceedings as well as in train discontinuance cases, the Commission has accepted the 50 percent formula as reasonably reflecting the cost of producing system off-line revenues. *Chicago, M. St. P. & P. R. Co., Discontinuance of Service*, 307 I.C.C. 565. In the absence of a more precise method for determining net feeder value, the examiner accepts as reasonable the 50 percent cost formula used by petitioner.

It is the further position of protestants that revenues are understated since no revenue was assigned to the trains for the transportation of pass riders. In a recent case, the Commission, in rejecting a similar contention, observed that "constructive revenues or phantom revenues—revenues from fares never collected—are of no measurable financial advantage to the carrier, and, thus should be disregarded in the computation of total revenues." *Southern Pacific Company Partial Discontinuance of Passenger Trains Between Los Angeles and Sacramento; Oakland and Sacramento; and San Francisco and San Jose, Calif.*, F. D. 20503, decided August 11, 1961. These remarks are equally applicable here. While no doubt the carrier incurs some expense in the transportation of pass riders, the expenses involved should be considered as being merely incidental to the petitioner's primary responsibility of operating the trains for the benefit of the public. So long as the trains are required to operate, the additional cost of carrying pass riders or deadheads is infinitesimal. Thus, there is no basis for reducing or adjusting the expenses of these trains because of the pass riders. Similarly, there is no merit in protestants' contention that the computa-

tion of express revenues on a car-foot mile basis is improper. See, *Chicago & N. W. Ry. Co. Discontinuance of Service*. 307 I.C.C. 775.

Another contention of protestants' is that any operating deficit on this line should be reduced by a percentage amount equivalent to the combined federal and State corporate income taxes. In considering and rejecting a similar contention in *New York Central R. Co. Abandonment*, 254 I.C.C. 745, 755, the Commission stated:

> "The committee of Yonkers Commuters contends, in effect, that the actual loss of $60,155 from the operation of the branch should be reduced to $36,093 because if the loss had not been incurred, applicant would have paid a 40 percent Federal income tax on an equal sum, amounting to $24,062, but obviously the loss was actually incurred, and it cannot reasonably be considered that it was less because applicant's total ioume [sic] tax might have been $24,062 less than it would have been had it not been incurred."

The findings and conclusions in the above report were affirmed in *Public Service Commission of New York* v. *United States*, 56 F. Supp. 351, affirmed 323 U.S. 675, rehearing denied 323 U.S. 817. The Commission has recently reaffirmed its position on this issue. See *Southern Pacific Co.—Partial Discontinuance of Passenger Trains, Los Angeles, etc., supra.* The contention of protestants on this issue must accordingly be rejected.

At the hearing, protestants emphasized the fact that petitioner's net railway operating income in 1960 was $36,107,599, and that its net income alone from freight operations on the line between Greensboro and Goldsboro averages $630,000, thus contending that the overall prosperity of the petitioner, as well as its intrastate freight operations, must be given effect in the disposition of the issues involved herein. With these contentions, the examiner disagrees. The legislative history of section 13a(2) indicates

that the purpose thereof is to permit the discontinuance of the operation of services that "*no longer pay their way* and for which there is no longer any public need to justify the heavy financial losses involved." (S. Rep. 1647, 85th Cong.). (Emphasis supplied). In considering a somewhat similar contention, in *Southern Pacific Co.—Partial Discontinuance of Passenger Trains, Los Angeles, etc., supra,* the Commission made the following pertinent statement:

> "Nowhere in section 13a(2) or elsewhere in the law is there any requirement that the prosperity of the intrastate operations of the carrier as a whole, or any particular segment thereof, must be given effect in determining whether the operation of an individual intrastate train imposes an unjust and undue burden on interstate commerce. To hold otherwise would be contrary to the apparent intent of the Congress."

In this same connection, the argument that losing passenger operations must be supported by constantly increasing freight rates is also untenable. In rejecting this argument, the Commission stated that such "theory of regulation would not be consonant with the national transportation policy, and would be fraught with disastrous possibilities." *Great Northern Ry. Co. Discontinuance of Service,* 307 I.C.C. 59, 61. Similarly, the fact that petitioner's system operations are profitable is entitled to little or no weight. See *New York Central R. Co. Abandonment, supra, Seaboard A. L. Ry. Co. Abandonment,* 257 I.C.C. 758, *Great Northern Ry. Co.—Discontinuance of Service, supra.*

Although protestants submitted no financial data with respect to trains 13 and 16, they contend on brief that the maximum loss incurred by the operation of these trains in 1960 was $33,688 instead of petitioner's claimed loss of $117,641. To reach this conclusion, protestants subtracted $6,940 (terminal expenses at the Goldsboro Union Station) and $41,517 (net feeder value) from petitioner's claimed

loss. From this amount ($70,184),[1] they further subtracted a federal income tax deduction (52 percent of $70,184) of $36,496.

For reasons hereinbefore stated, terminal expenses at Goldsboro have been allowed, and protestants' contention regarding income tax savings has been overruled. In the foregoing computation, protestants assume that petitioner will lose all system-connected revenue produced by these trains. Petitioner claims that it will retain all of it. Neither of these positions can be reasonably sustained. It seems obvious that petitioner will neither lose nor retain all of such revenue. The exact amount of system-connected revenue losses, however, can not be determined from the record. But assuming that the entire net feeder value of these trains will be lost, petitioner's minimum out-of-pocket loss from the operation of these trains, on the basis of 1960 figures and after deducting $550 for non-recurring expenses resulting from injuries to persons and livestock would be $75,574 annually. Add to this the savings of $15,015 in station expenses, previously referred to herein, and the net savings to be realized from the discontinuance of these trains would be at least $90,589 a year. On the theory that some of the feeder value will be retained, the examiner is of the opinion that the annual savings will be considerably in excess of $90,589 a year.

Among others, the factors to be considered in a proceeding of this nature are the populations of the communities served, the use made by the public of the trains sought to be discontinued, other means of transportation in the area, and the financial losses sustained by the carrier in providing the service. *Colorado* v. *United States*, 271 U.S. 153. Under the provisions of section 13a(2), the Commission's determination must be designed to protect interstate commerce from onerous burdens which may affect the ability of the carrier to continue to provide efficient

[1] There appears to be a mathematical error of $1,000 in protestants' calculation.

transportation service to the public generally. Thus, in determining public convenience and necessity, the needs of the entire public, as distinguished from the relatively few, must be taken into account. When there is a demonstrated need for the service, the continuation thereof might be justified even at a loss to the carrier. In the final analysis, however, the need for the service must be balanced against the losses sustained in providing the service.

That some need exists for the service of trains 13 and 16 is shown by the testimony of the opposition witnesses. Their need, however, is relatively insubstantial when viewed in the light of the density of the population of the area served and the patronage that is potentially available. Only scattered opposition appeared at the hearing in this proceeding and at the hearing held by the North Carolina Commission, and most of the opposition came from Durham, with virtually none east thereof. It is obvious that the needs of these few would be insufficient to justify the institution of a new service. Conversely, it should be equally apparent that under the test of public convenience and necessity, their needs no longer justify the continuation of existing service.

In arriving at this conclusion, the fact has not been overlooked that there has been an increase of nearly 50 percent in the daily average number of passengers patronizing these trains in the first 5 months of 1961 as compared with the entire year of 1959. In actual numbers, the daily average for both trains increased from 19.5 in 1959 to 29.6 in the first 5 months of 1961.

These figures, however, are of minor significance because the comparison of two entirely different periods fails to take into consideration seasonal variations in passenger traffic patterns and for the further reason that the increase in 1961 was due largely to an increased number of group movements of school children. Moreover, the percentage increase becomes even less meaningful when considered in the light of petitioner's statement that 82,000 additional passengers a year on these trains would be required to en-

able it to break even. Despite the increase in patronage in the first 5 months of 1961, passenger revenues during that period amounted to only $10,653, or $26,020 less than the wages of the train and engine crews.

For most of the major communities, alternate passenger service is available by bus and by air and 4 communities have rail passenger service. Only 3 small communities would be left wholly without bus service. Likewise, express service by motor truck, as proposed by the Railway Express Agency, should be adequate for most of the communities. While industrial expansion may, under certain circumstances, depend on rail passenger service, it would appear that industry is much more concerned about rail freight service than rail passenger facilities. For this reason, and because of the ever-increasing use of automobiles in the area involved, the economic growth aspect of this case is relatively unimportant. Neither the isolated instances of poor service nor defective train equipment sustain protestants contention that petitioner has deliberately discouraged the use of these trains as part of its plan to present a plausible case for abandoning service on the line. Neither the present nor prospective traffic on the line would justify the use of expensive or ultramodern equipment on these trains. As to petitioner's failure to advertise the services of these trains, the Commission has repeatedly held that prospective patrons who must be coaxed to use a service evidently have no urgent need for it.

In the light of all these considerations, and for reasons hereinbefore stated, the conclusion is warranted that the continued operation of trains 13 and 14 [16] would constitute a wasteful service and would impose an unjust and undue burden upon the interstate operation of petitioner and upon interstate commerce.

At the hearing, employees of petitioner whose jobs may be adversely affected as a consequence of the discontinuance herein requested that appropriate employee protective conditions be imposed in the event the trains are dis-

continued. Although the 10 operating employees on the trains will be entitled to other jobs with equal or better pay, other employees with less seniority may be furloughed or temporarily displaced. Three station employees and 2 pullman employees may also be furloughed. For reasons expressed in *Missouri Pacific Railroad Company Discontinuance of Passenger Service*, 312 I.C.C. 105, the examiner concludes that there is no authority under section 13a(2) for the imposition of conditions for the protection of employees adversely affected by the discontinuance of intrastate trains. It is recognized, however, that the probable adverse effect which the discontinuance of service would have upon employees is a factor to be considered in determining public convenience and necessity. In the instant proceeding such probable adverse effect does not afford a sufficient basis, when considered in connection with all of the facts hereinbefore discussed, to justify the continued operation of the trains.

Contentions of the parties as to either fact or law not specifically discussed herein have been given consideration and found to be without material significance or not justified.

In consideration of the petition here, the evidence adduced at the hearing, the contentions of the parties, and being fully advised in the premises, the examiner is of the opinion and finds that present and future public convenience and necessity permit the Southern Railway Company to discontinue the operation of its passenger trains Nos. 13 and 16 between Greensboro and Goldsboro, N. C., and that the continued operation thereof would constitute an unjust and undue burden upon petitioner's interstate operations and upon interstate commerce.

In view of the findings herein, the examiner recommends that the attached order granting the petition be entered.

By Wm. J. Gibbons, Hearing Examiner.

WM. J. GIBBONS
(Signature) Wm. J. Gibbons

APPENDIX A

SCHEDULES OF TRAINS NOS. 13 AND 16 OPERATING BETWEEN GREENSBORO AND GOLDSBORO AND POPULATIONS OF COMMUNITIES SERVED

Read Down Daily 16	Miles			Pop.		Read Up Daily 13
A.M.						P.M.
6:10	.0	Lv.	Greensboro	119,574	Ar.	7:50
f 6:22	8.0		McLeansville	300*	f	7:25
6:30	14.7		Gibsonville	1,784	f	7:16
6:34	16.7		Elon College	1,284	f	7:10
6:50	21.4		Burlington	33,199		7:02
f 6:53	23.1		Graham	7,723	f	6:42
6:57	25.8		Haw River	1,410	f	6:38
7:10	31.7		Mebane	2,364		6:32
f 7:20	37.0		Elfland	500*	f	6:21
7:25	40.9		Hillsboro	1,349		6:15
f 7:35	46.4		Glenn	n.s.*	f	6:06
7:55	55.0	Ar.	Durham	78,302	Lv.	5:55
8:10	55.0	Lv.	Durham		Ar.	5:55
f 8:32	68.7		Morrisville	222	f	5:19
8:39	72.8		Cary	3,356		5:14
8:55	81.1	Ar.	Raleigh	93,931	Lv.	5:00
9:10	81.1	Lv.	Raleigh		Ar.	4:30
f 9:18	86.9		Garner	3,451		4:20
9:30	96.1		Clayton	3,302		4:07
f 9:39	103.7		Wilsons Mills	280	f	3:57
10:00	109.2	Ar.	Selma	3,102	Lv.	3:50
10:00	109.2	Lv.	Selma		Ar.	3:50
f10:08	111.9		Pine Level	833	f	3:30
10:18	117.7		Princeton	948		3:23
f10:25	123.7		Rose	n.s.*	f	3:15
10:45	129.1	Ar.	Goldsboro	28,873	Lv.	3:05
A.M.						P.M.

f—Flag stop.
n.s.—No population shown.

Source:

Southern Railway System Passenger Train Schedules, folder dated October 30, 1960. Population figures taken from Final 1960 Census, U.S. Bureau of the Census except that those marked with an asterisk * were obtained from Rand McNally Commercial Atlas & Marketing Guide, 91st Edition, 1960.

APPENDIX B

PASSENGERS HANDLED ON TRAIN 13

	On	D/A*	Off	D/A*
Goldsboro, N. C.	989	2.7	—	—
Rose, N. C.	1	—	2	—
Princeton, N. C.	75	.2	130	.4
Pine Level, N. C.	18	—	18	—
Selma, N. C.	340	.9	201	.5
Wilsons Mills, N. C.	29	.1	23	.1
Clayton, N. C.	124	.3	17	—
Garner, N. C.	57	.2	6	—
Raleigh, N. C.	826	2.3	371	1.0
Cary, N. C.	25	.1	70	.2
Durham, N. C.	2929	8.0	453	1.2
Glenn, N. C.	1	—	53	.1
Hillsboro, N. C.	51	.1	266	.7
Efland, N. C.	—	—	12	—
Mebane, N. C.	117	.3	38	.1
Haw River, N. C.	1	—	12	—
Graham, N. C.	4	—	3	—
Burlington, N. C.	1464	4.0	156	.4
Elon College, N. C.	17	—	57	.2
Gibsonville, N. C.	8	—	140	.4
Greensboro, N. C.	—	—	5048	13.8
Total	7076	19.3	7076	19.3

*—Daily Average

APPENDIX C

PASSENGERS HANDLED ON TRAIN 16

	On	D/A*	Off	D/A*
Greensboro, N. C.	5101	13.9	—	—
McLeansville, N. C.	—	—	2	—
Gibsonville, N. C	3	—	17	—
Elon College, N. C.	19	.1	51	.1
Burlington, N. C.	112	.3	1275	3.5
Graham, N. C.	4	—	4	—
Haw River, N. C.	4	—	25	.1
Mebane, N. C.	68	.2	63	.2
Efland, N. C.	14	—	2	—
Hillsboro, N. C.	127	.3	58	.2
Glenn, N. C.	14	—	4	—
Durham, N. C.	775	2.1	2712	7.4
Morrisville, N. C.	—	—	4	—
Cary, N. C.	14	—	13	—
Raleigh, N. C.	667	1.8	1274	3.5
Garner, N C.	49	.1	17	—
Clayton, N. C.	174	.5	374	1.0
Wilsons Mills, N. C.	4	—	30	.1
Selma, N. C.	147	.4	343	.9
Pine Level, N. C.	26	.1	20	.1
Princeton, N. C.	378	1.0	133	.4
Goldsboro, N. C.	—	—	1279	3.5
Total	7700	21.0	7700	21.0

*—Daily Average

APPENDIX D

Operating Results of Passenger Trains 13 and 16 between Greensboro, N. C. and Goldsboro, N. C. Year 1960

Revenues.

Passenger	$ 21,135
Express	31,630
Miscellaneous	336
Total Revenues	$ 53,101

Direct Expenses:

Wages, Train and Engine Crews	$ 89,182
Payroll Tax	5,250
Train Fuel	11,244
Injuries to Persons	500
Damage to Live Stock on R/W	50
Pullman Co. Net Loss	4,226
Engine House Expenses	1,590
Passenger Locomotive Lubricants	1,336
" " " Other Suppl.	372
" " " Repairs	21,586
" Train Cars—CHLW & Icing	7,164
" " " —Lubricants	447
" " " —Other Exps.	942
" " " —Repairs	13,692
" " " —Air Cond.	5,060
Goldsboro Union Station	6,940
Rental of Equipment	681
Total Direct Expenses	$170,742
Direct Expenses of Excess Revenues	$117,641

Recommended by Wm. J. Gibbons, Hearing Examiner.
(Signature) WM. J. GIBBONS

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C. on the day of A.D. 1961.

Finance Docket No. 21563

SOUTHERN RAILWAY COMPANY DISCONTINUANCE OF SERVICE BETWEEN GREENSBORO AND GOLDSBORO, N. C.

Investigation of the matters and things involved in this proceeding having been referred to and heard by the Hearing Examiner, who has made and filed a report containing his findings of fact and conclusions thereon, which report is made a part hereof, and said proceeding having been duly submitted:

It is ordered, That protestants' motions to dismiss the proceeding be, and they are hereby overruled.

It is further ordered, That the petition of the Southern Railway Company to discontinue the operation of the passenger trains specified in the aforesaid report be, and it is hereby granted.

It is further ordered, That the authority herein granted shall not be exercised prior to the date of service of an order adopting this order as the order of the Commission, or a notice stating that this recommended order has become the order of the Commission.

And it is further ordered, That if the authority granted herein is not exercised within one year from the effective date thereof, it shall be of no further force or effect.

By the Commission, division 3.

HAROLD D. MCCOY,
Secretary.

(SEAL)

APPENDIX D

The Statute Involved. 49 U.S.C. 13a(2)

(2) Where the discontinuance or change, in whole or in part, by a carrier or carriers subject to this chapter, of the operation or service of any train or ferry operated wholly within the boundaries of a single State is prohibited by the constitution or statutes of any State or where the State authority having jurisdiction thereof shall have denied an application or petition duly filed with it by said carrier or carriers for authority to discontinue or change, in whole or in part, the operation or service of any such train or ferry or shall not have acted finally on such an application or petition within one hundred and twenty days from the presentation thereof, such carrier or carriers may petition the Commission for authority to effect such discontinuance or change. The Commission may grant such authority only after full hearing and upon findings by it that (a) the present or future public convenience and necessity permit of such discontinuance or change, in whole or in part, of the operation or service of such train or ferry, and (b) the continued operation or service of such train or ferry without discontinuance or change, in whole or in part, will constitute an unjust and undue burden upon the interstate operations of such carrier or carriers or upon interstate commerce. When any petition shall be filed with the Commission under the provisions of this paragraph the Commission shall notify the Governor of the State in which such train or ferry is operated at least thirty days in advance of the hearing provided for in this paragraph, and such hearing shall be held by the Commission in the State in which such train or ferry is operated; and the Commission is authorized to avail itself of the cooperation, services, records and facilities of the authorities in such State in the performance of its functions under this paragraph. (Feb. 4, 1887, ch. 104, pt. I, § 13a, as added Aug. 12, 1958, Pub. L. 85-625, § 5, 72 Stat. 571.)

APPENDIX E

Excerpts from Legislative History of 49 USC 13a. 85th Congress. Second Session 1958

1. Senate Report No. 1647, June 3, 1958, accompanying S-3778 pages 21-22:

5. ICC AUTHORITY OVER UNPROFITABLE SERVICES AND FACILITIES

A most serious problem for the railroads is the difficulty and delay they often encounter when they seek to discontinue or change the operation of services or facilities that no longer pay their way and for which there is no longer sufficient public need to justify the heavy financial losses entailed. The subcommittee believes that the maintenance and operation of such outmoded services and facilities constitutes a heavy burden on interstate commerce.

Railroad management, it must be understood, is not always free without authorization to discontinue, curtail, consolidate or otherwise change services or facilities in an effort to deal realistically with unprofitable, deficit-producing operations. Generally speaking, such matters fall within the scope of State law; and in a great many instances a railroad may not discontinue or change the operation of a train or other service or facility without first obtaining permission to do so from the regulatory authority of the State in which the operation is conducted.

Without reciting individual cases the subcommittee is satisfied that State regulatory bodies all too often have been excessively conservative and unduly repressive in requiring the maintenance of uneconomic and unnecessary services and facilities. Even when allowing the discontinance or change of a service or facility, these groups have frequently delayed decisions beyond a reasonable time limit. In many such cases, State regulatory commissions have shown a definite lack of appreciation for the serious impact on a railroad's financial condition resulting from prolonged loss-producing operations.

To improve this situation, the subcommittee proposes to give the Interstate Commerce Commission jurisdiction in

the field of discontinuance or change of rail services and facilities similar to the jurisdiction it now has over intrastate rates under section 13 of the Interstate Commerce Act so that when called upon to do so it may deal with such matters that impose an undue burden on interstate commerce. This, the subcommittee believes, would protect and further the broad public interest in a sound transportation system and would prevent undue importance being attached to matters of a local nature.

2. House Report 1922, June 18, 1958, accompanying H.R. 12832 (U. S. Code Congressional and Administrative News, 1958, vol. 2 pages 3467-68):

A major cause of the worsening railroad situation is the unsatisfactory passenger situation. Not only is the passenger end of the business not making money—it is losing a substantial portion of that produced by freight operations.

Although no specific bill was then before the committee, extensive hearings on this problem were conducted in May of this year.

The true deficit from railroad passenger service is in dispute. The Interstate Commerce Commission estimates it in the neighborhood of $700 million a year, though it currently is conducting an investigation which involves reconsideration of its present rules governing distribution of costs between freight and passenger service. Whatever the deficit is, it is clear that it is large and constitutes a substantial burden on revenues from freight.

The president of one railroad testified that last year the railroad had net railway operating income from freight service of over $100 million, against which it had a loss from passenger service of $57 million; that over the past 10 years the passenger service net railway operating income deficit of $523 million applied to a net railway operating income from freight of $1,124 million, left it with a return of only 2.49 percent on depreciated investment; and

that if the passenger service merely had broken even this return would have been 4.67 percent.

Another railroad president testified that last year it had a net income of $8 million, which represented a profit from noncarrier operations of $27 million, net income from freight service of $33 million, and a loss from passenger service of $52 million. This loss he based on the ICC distribution of costs, whereas he felt that it was closer to $78 million which had been estimated by an independent group.

It is obvious that in very great measure these passenger losses are attributable to commuter service. It is clear that where such necessary services cannot be made to pay their way, the interested communities have a very real interest in working out the problem. It would seem evident that if such urban or interurban commuting service must be preserved, losses incurred will have to be met in some way by the communities. It is unreasonable to expect that such service should continue to be subsidized by the freight shippers throughout the country.

There are substantial losses, however, occurring in passenger service beyond those attributable solely to commuter service. Where this passenger service—and passenger service means more than merely transportation of passengers, and involves "head-end" service, such as baggage, mail, and express—cannot be made to pay its own way because of lack of patronage at reasonable rates, abandonment seems called for.

Under the act, the Interstate Commerce Commission has jurisdiction over the complete abandonment of a line of track. The discontinuance or change of schedules of trains (without complete abandoning of the line of track over which they operate) however, is subject to the jurisdiction of the interested States. Such local regulation of what has come to be a national problem has hampered the railroads from making some changes in their passenger train operations in line with changes in patronage, and has contributed greatly to the passenger deficit.